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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1960.

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Additional Judge.

The Hon'ble Mr. Justice V. Subrahmanyam, B.A., B.L. (Till 1st March, 1960).

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Mr. V. K. Thiruvenkatachari.

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I] JANUARY [1960

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAMACHANDRA IYER AND MR. JUSTICE GANAPATIA PILLAI.

O. RM. P. RM. Ramanathan Chettiar .. *Appellant**

v.

P. S. L. Ramanathan Chettiar and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938, *as amended by Madras Act XXIII of* 1948), *section* 19 (2) *—Applicability—Decree passed prior to Amending Act—Appeal pending at commencement of Act but disposed of after—Debtor not applying for scaling down at time of disposal of appeal—Right to apply for amendment afterwards—Amending Act (XXIII of* 1948), *section* 16 (1), *(ii) and (iii)—Applicability and scope—Section* 16, *proviso—Applicability—Decree on basis of deposit with banker passed on 2nd October,* 1944*—If "debt payable at commencement of (Act IV of* 1938)" *and if liable to be scaled down—"Court which passed the decree"—"Court of first instance"—Jurisdiction to scale down and amend decree after disposal of appeal by appellate Court—Civil Procedure Code (V of* 1908), *section* 37, *and Order* 21, *rule* 1.

Per *Full Bench*.—Section 19 (2) of the Madras Agriculturists' Relief Act (as amended in 1948) which was introduced by the Amending Act XXIII of 1948 (which came into force on 25th January, 1949) rendered the provisions of section 19 (1) applicable to decrees passed after the main Act. In order to obtain the benefit of section 19 (2), the debtor must establish that his case fell under one of the three clauses of section 16 of the Amending Act. The three clauses of section 16 of the Amending Act XXIII of 1948 are disjunctive, each of them relating to a distinct category and a case which would come under section 16 (ii) would not be comprehended by section 16 (iii) as well.

Where a decree was passed on 27th February, 1946, an appeal and a memorandum of cross-objections were filed and were pending in the High Court on the date of the coming into force of Act XXIII of 1948, and both were dismissed on 14th September, 1951, after the Amending Act came into operation, section 16 *(iii)* of the Amending Act would not apply. But section 16 (ii) of that Act would govern the case and would clearly entitle the debtor to apply for relief under the Act even at the time when the appeal was heard. The omission on the part of the debtor to so apply for relief at that stage, that is, at the time when the appellate Court passed the decree, would not preclude him from applying at a later stage on the principle of *res judicata*. Section 16 (ii) of the Amending Act which relates to suits and proceedings instituted before that Act came into force would apply (1) when no decree or order had been passed and also (2) when the decree or order had not become final on that date. The section does not prescribe as to when the relief is to be claimed and having regard to the generality of section 19 (2) of the main Act, it must be held that the Act expressly gave a right of amendment of decree thereunder.

The true test is whether the suit or proceeding was instituted before 25th January, 1949 and whether in that suit or proceeding an order or decree for repayment of a debt was passed. The principle of contructive *res judicata* would therefore not apply and deprive the debtor of the statutory right under section 16 (ii) of the Amending Act to have the decree amended by applying the provisions of the Act. *S.PL. Narayan Chettiar* v. *M.A.R. Annamalai Chettiar*, (1959) S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55, applied and followed.

Per *Division Bench*.—Sections 19 and 20 of the Act have to be read together; section 20 is complementary to section 19 and the *Explanation* to section 20 would apply to section 19 as well as to the meaning to be given to the expresssion " the Court which passed the decree " and the effect of the *Explanation* is that a statutory definition has been given of the expression "the Court which passed the decree". The Court to amend the decree under section 19 would therefore be that Court which would be the Court for execution under section 37, Civil Procedure Code. An application to scale down a decree debt and amend the decree could therefore be properly made to the Court of first

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* A.A.O. No. 171 of 1953 and 8th August, 1959.
C.M.P. No. 571 of 1959 in Appeal No. 249 of 1947.

instance although the decree of that Court had been superseded by the decree of an appellate Court. The principle that the original decree in a case where an appeal has also been filed, is suspended and that the appellate decree is the only decree between the parties for purposes of section 19 would have no application to a case where the appellate decree was itself capable of being amended under section 19. Hence an application under section 19 (1) or section 19 (2) has to be made to the Court of first instance which passed the decree even though the appellate Court had either affirmed, modified or reversed the decree of that Court and that Court alone would have jurisdiction to entertain applications under section 19 (2).

Gangaraju v. *Ramayya*, (1939) 1 M.L.J. 329 : I.L.R. (1939) Mad. 520, approved.

Veerappa Chetti v. *Sivagami Achi*, (1941) 2 M.L.J. 964, *Palani Mudali* v. *Athiappa Goundan*, (1942) 2 M.L.J. 599 and *Moideen Batcha* v. *Chidambaram Pillai*, (1944) 2 M.L.J. 338, distinguished.

Periaswami v. *Romaswami*, (1940) 2 M.L.J. 513 : I.L.R. (1941) Mad. 53 and *Lingappa* v. *Chinnaswami*, (1955) 1 M.L.J. 1, followed.

Where a sum of money was paid into Court prior to the enactment of Act XXIII of 1948, in pursuance of an order of the appellate Court as a condition for stay of execution of the decree placing restrictions on the decree-holder drawing out the money, it cannot be held to be a deposit under Order 21, rule 1, Civil Procddure Code, because a deposit under that rule has to be voluntary or unconditional. The deposit must be deemed to have been made only provisionally subject to the result of the pending appeal ; it can be deemed to be a payment to or realisation on behalf of the decree-holder only on the date of disposal of the appeal; when that date of disposal is subsequent to the 25th January, 1949, the proviso to section 16 of the Amending Act XXIII of 1948 would not apply to the case as the amount could be said to have been realised by the creditor only after the commencement of the Act.

Sheo Gholam Sahoo v. *Rahut Hussain*, (1878) I.L.R. 4 Cal. 6 and *Ramayya Ayyer* v. *Gopalier*, (1918) 35 M.L.J. 355 : I.L.R. 41 Mad. 1053, applied.

Tata Iron & Steel Company v. *Baidyanath*, (1921) I.L.R. 2 Pat. 754, distinguished.

The expression "debt payable at such commencement" in section 19 (2) means a debt payable at the commencement of the main Act IV of 1938, that is 22nd March, 1938.

Govindaswami Goundar v. *Ramaswami Gounder*, (1958) 2 M.L.J. 185, relied on.

The word "payable" indicates that the debtor must be liable or obliged to pay the amount and a mere option in the debtor to pay cannot render the amount as one "payable".

Where the decree as passed on the basis of a deposit made by the creditor with the debtor as a deposit with a banker, and the demand for the return of the money was made on 2nd October, 1944 and the amount became payable only on demand, it cannot be said that there was a decree in respect of a debt payable at the commencement of the Act within the meaning of section 19 (2) of the Act. The decree cannot, therefore, be scaled down under section 19 (2) of the Act, as amended by Act XXIII of 1948.

Bancharam Majumdar v. *Adyanath Bhattarcharjee*, (1909) I.L.R. 36 Cal. 936, *Guntur Narasimhan* v. *Nyapati Narayana Rao*, (1925) 92 I.C. 405, *Allah Ditta* v. *Sadhu Shab*, (1933) 147 IC. 338, distinguished.

Mohammad Akbarkhan v. *Attarsingh*, (1936) I.L.R. 17 Lah. 557 : 71 M.L.J. 712 (P.C.); *Ramaswami Chetti* v. *Manickam Chetti*, (1938) 1 M.L.J. 56, *Suleman Haji Ahmed Umer* v. *Abdulla Haji Rahimdulla*, (1940) M.W.N. 1000 : I.L.R. (1940) Kar. 277 (P.C.) and *Joachimson* v. *Swiss Bank Corporation*, L.R. (1921) 3 K.B. 110, relied on.

Sheldon on 'The Practice and Law of Banking', 6th edition, page 221, referred to.

Appeal No. 171 of 1953 against the Order of the Court of the Subordinate Judge of Devakottai, dated 20th February 1953 and made in I.A. No. 606 of 1952, in O.S. No. 33 of 1945, and Petition No. 571 of 1959 praying that in the circumstances stated in the affidavit filed in support thereof the High Court may be pleased to direct the scaling down of the decree in A.S. No. 249 of 1947 on the file of the High Court confirming the decree in O.S. No. 33 of 1945, Sub-Court, Devakottai, as per the provisions of the Madras Agriculturists Relief Act as per particulars set out in the Schedule hereunder.

R. Gopalaswami Ayyangar and *N. Panchapakesa Ayyar*, for Appellant in A.A.O. No. 117 of 1953.

G. R. Jagadisan, *N. C. Raghavachari* and *S. Viswanathan*, for Respondents in A.A.O. No. 117 of 1953.

K. Parasurama Ayyar, for Petitioner in C.M.P. No. 571 of 1959.

R. Gopalaswami Ayyangar, for Respondent in C.M.P. No. 571 of 1959.

When the appeal first came on for hearing before *Ramaswami, J.*, he made the following

ORDER OF REFERENCE.—This is an appeal against the order of the learned Subordinate Judge of Devakottai, in I.A. No. 606 of 1952 in O.S. No. 33 of 1945.

The facts necessary for the disposal of this appeal are: Subsequent to the coming into force of Act XXIII of 1948 namely, 25th January, 1949, no application was made for invoking the benefits under the new Act. Then the judgment-debtor has applied at the stage of execution in 1952 for being given this relief under the Agriculturists Relief Act. The Subordinate Judge has held that the judgment-debtor was entitled to the relief asked for. Hence this appeal.

In appeal I find that there are two conflicting decisions of this Court. In *Narayanan Chettiar* v. *Annamalai Chettiar*[1], Subba Rao and Somasundaram, JJ., held that where a debtor had an opportunity to ask for relief under section 19 (2) of the Act before the coming into operation of the Act on 25th January, 1949, he cannot file a subsequent application because it will stand barred by *res judicata* and that having regard to the scope of section 16 of Act XXIII of 1948 they were inclined to hold that despite the amended section 19 (2) of the Act the position of a party who did not raise the plea under the Agriculturists Relief Act after the said Act came into force was not different from that laid down by the Full Bench in *Sriramareddi* v. *Sriramareddi*[2].

In *Lingappa Chettiar* v. *Chinnaswami Naidu*[3], Govinda Menon and Mack, JJ., held that the judgment-debtor was entitled to apply even subsequently under section 19 (2) of the Act. The Bench noticed the decision in *Narayanan Chettiar* v. *Annamalai Chettiar*[1], and stated at page 701:

"We are afraid we cannot with respect accept this view. This view is directly opposed to the statement of objects and reasons which we have extracted above. As we have already stated, one cannot escape from the plain meaning of the words contained in sub-section (2). Apart from the statement of objects and reasons, we do not find any difficulty in holding that sub-section (2) of section 19 is applicable to cases like the present, and the retrospective nature of that sub-section as contemplated by clause (iii) of section 16 of Act XXIII of 1948 cannot be restricted or circumscribed by any other clause in that section. The same view has been expressed by us in L. P. A. No. 117 of 1949 and by one of us in C.M.A. No. 143 of 1948. We are, therefore, of opinion that the appellant is entitled to apply for scaling down under section 19 (2) of Madras Act IV of 1938."

Therefore, if the former judgment is followed this appeal has got to be allowed and if the latter judgment is followed the appeal will have to be dismissed.

I consider in view of the fact that controversies of this nature are frequently coming up there must be an authoritative decision by a Full Bench resolving this conflict.

Therefore, let these papers be placed before the Chief Justice for constituting a Full Bench if my Lord deems fit. The entire case may be disposed of by the Full Bench.

(In pursuance of the above order of reference the appeal came on for hearing before the Full Bench consisting of *P. V. Rajamannar, C.J., Ramachandra Iyer* and *Ganapathia Pillai, JJ.*)

The Order of the Court was made by

*Ramachandra Iyer, J.**—This appeal arises from an order of the Subordinate Judge of Devakottai in I.A. No. 606 of 1952 in O.S. No. 33 of 1945 scaling down the decree passed in the suit by applying the provisions of Madras Agriculturists Relief Act, IV of 1938 (which, shall hereafter be referred to as the Act). The decree-holder is the appellant.

In respect of a deposit made by his father with the respondents' grandfather the appellant obtained a decree in the suit referred to above on 27th December, 1946, for a sum of Rs. 11,459-14-0 with subsequent interest and costs. Both the respondents and the appellant filed respectively in this Court an appeal and a memorandum of cross-objections against the decree. It is conceded that the respondents did not claim the benefit of the scaling down provisions of Act IV of 1938 at the time when the suit was pending in the trial Court, or even at the time when the appeal was heard by this Court. By the judgment and decree of this Court, dated 14th September, 1951, the appeal as well as the memorandum of cross-objections were dismissed.

1. (1953) 2 M.L.J. 174 : A.I.R. 1953 Mad. 914.
2. (1941) 2 M.L.J. 855 : I.L.R. (1942) Mad. 346 : A.I.R. 1941 Mad. 929 (F.B.).
3. (1955) 1 M.L.J. 1.

* 23rd February, 1959.

The appellant, thereupon, commenced execution proceedings. The respondents, the judgment-debtors, countered them by filing applications under the provisions of Act IV of 1938 and section 151 of the Civil Procedure Code. It is unnecessary to refer to those applications except to I.A. No. 606 of 1952 which was filed for scaling down the decree under section 19 (2) of Act IV of 1938. The decree-holder contested the application on various grounds; the principal one being that the Court had no jurisdiction to amend the decree of the appellate Court which was passed after the coming into force of Act XXIII of 1948 (which shall hereafter be referred to as the amending Act). The learned Subordinate Judge negatived the contentions of the decree-holder and scaled down the decree. The present appeal arises from that order.

It is not contested that the respondents are agriculturists within the meaning of section 3 (2) of the Act. Section 19 (2), under which the application to the lower Court was filed, was introduced by Act XXIII of 1948, and it came into force on 25th January, 1949. That provision rendered the provisions of section 19 (1) applicable to decrees passed after the main Act. Ramaswami, J., before whom the appeal originally came up for hearing felt that there was a conflict between the decisions in *Narayana* v. *Anamalai*[1], and *Lingappa* v. *Chinnaswami*[2], on the question whether the respondent would be barred by principles of *res judicata* in seeking relief under section 19 (2) of the Act. The appeal was thereupon directed to be heard by a Full Bench.

The consideration of the question has, however, been rendered unnecessary in view of the decision of the Supreme Court in *S. PL. Narayanan Chettiar* v. *M. AR. Annamalai Chettiar*[3]. That was an appeal filed against the decision in *Narayanan* v. *Annamalai*[1]. The Supreme Court has held that in the circumstances similar to the present case the debtor would be entitled to apply for scaling down of the decree under section 19 (2) of the Act.

Section 19 (2) of the Act was introduced by way of amendment by the Amending Act referred to above. Prior to the amendment, section 19 enabled the reopening and scaling down of the decrees passed aginst the agriculturists before the Act came into force. Section 19 (2) made the provisions of section 19 (1) (which was section 19 in the unamended Act) applicable to the case of a decree passed after the commencement of the Act. But the application of section 19 (2) which was section 10 of Act XXIII of 1948, would be governed by section 16 of the latter Act. In the decision referred to, the Supreme Court agreed with the view of this Court that the amendments enacted under the Amending Act apply to suits and proceedings described under the three clauses of that provision and that in order to obtain the benefit of section 19 (2) of the Act the debtor must establish that his case came under one of the three clauses of section 16 of the Amending Act. Section 16 runs :

"The amendments made by this Act shall apply to the following suits and proceedings, namely:

(i) all suits and proceedings instituted after the commencement of the Act ;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before such commencement :

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act :

Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

Section 16, clause (*i*) which renders the amendment applicable to suits thereafter to be filed, that is, after 25th January, 1949, would not in terms apply to the present case as the suit had been filed before the Amending Act came into force.

The contention advanced on behalf of the appellant before us was that in respect of a suit or appeal which was pending at the time when the Amending Act came

1. (1953) 2 M.L.J. 174.
2. (1955) 1 M.L.J. 1.
3. C.A. No. 117 of 1955. Since reported in (1959) S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55.

into force, but where a decree was passed subsequent thereto, the provisions of both clauses (*ii*) and (*iii*) of section 16 would apply and that the debtor could at any time apply for scaling down of the decree in accordance with section 19 (1) of the Act. It was argued that section 16, clause (*iii*) giving as it does a statutory right to the debtor, it could not depend for its application, on any act of the debtor in either applying or omitting to apply for the benefits under the Act under section 16 (*ii*). We cannot accept this contention. The three clauses of section 16 are disjunctive and each of them relate to a distinct category and a case that would come under section 16, clause (*ii*) would not be comprehended by section 16, clause (*iii*) as well. This was the view expressed in *Vankatarathnam* v. *Seshamma*[1], which followed the decision in *Narayana* v. *Annamalai*[2]. The Supreme Court has accepted this view in the decision referred to above. The debtor in the instant case would, therefore, have no right to sustain his application under section 16, clause (*iii*).

The question then arises whether the debtor could have the decree amended by reason of section 16, clause (*ii*) which renders the provisions of the Amending Act applicable to suits or proceedings pending on the date when that Act came into force, that is on 25th January, 1949. We have already pointed out that the appeal from the decree was pending in this Court at that time. Section 16, clause (*ii*) would clearly entitle the debtor to apply for relief under the Act even at the time when the appeal was heard. In similar circumstances *Narayana* v. *Annamalai*[2], held that as the right to plead the benefits under the Act was available to the debtor at the time when the appellate Court passed the decree, he ought to have applied for relief at that stage, and having failed to do so, he was barred by principles of *res judicata* from applying at a later stage.

The question,however,depends on the contruction of section 16 (*ii*) of the Amending Act. If that provision enables the debtor to apply for relief in the class of cases contemplated by it, either before or after the decree, the rule of *res judicata* which is essentially a rule of procedure could not abrogate a right expresssly given by the Statute. The Supreme Court has held that the relief under section 19 (2) of the Act is one which expressly relates to cases where decrees have already been passed and would entitle the debtor to apply unless there is any limitation to such a right imposed by clause (*ii*) of section 16 of the Amending Act. Section 16 (*ii*) relates to suits and proceedings instituted before the Amending Act came into force and it would apply (1) when no decree or order had been passed and also (2) when the decree or order had not become final on that date. That section does not prescribe as to when the relief is to be claimed and having regard to the generality of section 19 (2) it should be held that the statute expressly gave a right of amendment of decree thereunder. The learned Judges of the Supreme Court held that the true test was whether the suit or proceeding was instituted before 25th January, 1949 and whether in that suit or proceeding an order or deceree for repayment of the debt was passed. They observed :

> " It may *prima facie* appear to be anomalous that it should be available to a party to ask for relief under the Act after the passing of the decree,when he had an opportunity of asking for that relief before the decree was passed, but did not do so. The Legislature may not have realised that this would be so ; but as the amendments stand, it is clear that in cases covered by clause (*ii*) of section 16 of the Amending Act, a party is entitled to ask for relief under the Act at two stages, before a decree for repayment of the debt has been passed and also after such a decree has been passed."

The right to have decrees of the kind contemplated by section 16 (*ii*) amended by applying the provisions of the Act being thus a right conferred by the statute the principle of constructive *res judicata* would not apply. It is unnecessary for the purpose of the present case to consider as to what would be the result if the debtor had applied for the benefits under the Act when the decree was passed. The Supreme Court in the judgment aforesaid has indicated that to such a case the bar of *res judicata* would apply.

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1. (1952) 1 M.L.J. 264 : I.L.R. (1952) Mad. 492 (F.B.)
2. (1953) 2 M.L.J. 174.

In the present case an appeal in this Court was pending at the time when the Amending Act came into force. We have already pointed out that at the stage of the appeal there was no plea for relief under the Act. The decision of the Supreme Court would directly apply to the instant case. The respondent would therefore, be entitled to apply for relief under section 19 (2) of the Act.

This, however, does not dispose of the appeal as the appellant has raised other objections to the decision of the lower Court. As regards one of the objections, namely, whether the lower Court was competent to give relief under section 19 (2) of the Act by way of abundant caution he has filed C.M.P. No. 571 of 1959 in A.S. No. 249 of 1947. That application is pending in this Court and will be heard by a Bench. It is, therefore, desirable that the other questions involved in this appeal should be decided by the Bench along with C.M.P. No. 571 of 1959 and it will be posted accordingly.

(This appeal and the petition then came on for hearing before the Division Bench consisting of *Rajagopalan* and *Ramachandra Iyer, JJ.*).

The Judgment of the Court was delivered by

Ramachandra Iyer, J.†—When the above matter was heard by us on receipt of the opinion of the Full Bench, the case for the appellant was presented to us in two aspects: (i) the jurisdiction of the lower Court to grant relief under section 19 (2) of the Act and (ii) the liability of the decree debt to be scaled down under its provisions. For appreciating the contentions urged, it is necessary to set out a few facts.

As indicated in the judgment of the Full Bench, the decree was in respect of a claim for return of a deposit made by the appellant's father with the respondent's father. The deposit was made on 11th March, 1926, and was repayable on demand together with interest at the thavanai rate. A demand was made on 2nd October, 1944 and that not having been complied with, the suit was filed a few months thereafter. The respondent's case was that the transaction was a mere loan, and that the claim was barred by limitation. The learned Subordinate Judge held that the transaction amounted to a deposit and overruling the other contentions of the respondent passed a decree for the sum claimed.

The respondent, thereupon, filed an appeal, A.S. No. 249 of 1947, to this Court. Pending the appeal he applied for the stay of execution of the decree but without success. The appellant levied execution, and at that stage the respondent came forward with an application to this Court in C.M.P. No. 3112 of 1947, offering to deposit the entire decree amount into Court, and seeking directions to prevent the appellant from taking the money except on furnishing security. This Court by its order, dated 9th July, 1947, acceded to that request and directed that, if the respondent were to deposit the entire decree amount by 20th August, 1947, the appellant would not be allowed to draw out the same in satisfaction of the decree except on furnishing security for its repayment in case the respondent were to succeed in A.S. No. 249 of 1947. The debtor made the deposit on 24th July, 1947, within the time prescribed by the order of this Court. The appellant did not draw the money as he failed to comply with the condition imposed on the drawing of the money. On 14th September, 1951, this Court dismissed the appeal, holding that the transaction was one by way of deposit payable on demand, and that as the demand made in the instant case was within three years of the suit, the claim was not barred by limitation.

Mr. R. Gopalaswami Iyengar, the learned advocate for the appellant, contended that as the decree of the trial Court was merged in the decree of this Court in A.S. No. 249 of 1947, the lower Court would have no jurisdiction to grant the relief by way of an amendment of the decree under section 19 (2) of the Act, and that the proper Court to grant the relief would be only this Court which disposed of the appeal. To get over this objection the respondents have filed an application to this Court in C.M.P. No. 571 of 1959 in A.S. No. 249 of 1947 for scaling down the amount due under the appellate decree. The objection of the appellant to that application is that by the time when that application was filed, the respondents were not agriculturists

† 8th August, 1959.

and would, therefore, be not entitled to the benefit of Act IV of 1938. The question of jurisdiction of the lower Court is, therefore, material for the purposes of this case.

Where a decree of a Court is appealed against its finality would be suspended and the decree passed by the appellate Court would supersede it, be it a case of either affirmance, modification or reversal. In all such cases the appellate decree will be the only decree for purpose of execution. It is, therefore, contended that where a decree has been passed by an appellate Court, the original Court would have no jurisdiction to amend the decree. Reference was made in this connection to the cases arising under section 152, Civil Procedure Code. Section 152, Civil Procedure Code, embodies what in the English Courts was called "the slip rule"; it gives power to a Court to correct the clerical or arithmetical mistakes in judgments, decrees, etc. The provision contemplates that the decree or judgment would be a valid one and the jurisdiction conferred was only to correct the mistakes of the type mentioned. Where, however, the matter was taken up on appeal the judgment or decree was set at large and all mistakes could be rectified and a proper decree passed by the appellate Court; it would follow that that Court alone will have the power to amend its judgment.

But the amendment contemplated by section 19 of the Act is of a different character. It does not contemplate the subsistence of the decree but contemplates a re-opening of the same, scaling down the debt and passing a revised decree in accordance with the Act. An amendment under section 19 of the Act does not, therefore, contemplate a mere correction of an existing decree in regard to slips or mistakes but the passing as it were of a new and revised decree. The jurisdiction for such an amendment of the decree is not one under sections 152 and 153, Civil Procedure Code, but under section 19 of the Act. That provision enacts that an amendment of the decree thereunder should be by the Court which passed the decree. If there is no other provision it would certainly mean that where a decree of the trial Court has been superseded by one by the appellate Court, the latter would be the one that passed the decree. But the statute has provided an interpretation of the words 'the Court which passed the decree' in the *Explanation* to section 20. Section 20 is complementary to section 19. That enables an executing Court to stay proceedings till an amendment of the decree has been made by the Court which passed the decree. The *Explanation* is that the expression shall have the same meaning as in the Code of Civil Procedure. That the *Explanation* would apply to provisions of section 19 is clear from the fact that Section 20, to which the *Explanation* is added, itself refers to the Court which passed the decree for amending the decree under section 19. In the Code of Civil Procedure there is no definition of the expression 'Court which passed a decree.' Section 37 of the Code of Civil Procedure states that the expression 'the Court which passed a decree', shall in relation to the execution of decree, unless there is anything repugnant in the subject or context, be deemed to include, where the decree to be executed has been passed in exercise of appellate jurisdiction, the Court of first instance. The fiction enacted by that provision would, on its terms, apply to the case of an execution and not the other matters provided for in the Code. It was contended for the appellant that that fiction could not apply to proceedings under section 19, which are not proceedings in execution but in the suit itself. Plausible as the argument appears, we cannot accept the same. Section 20 which gives power to an executing Court specifically refers to that Court as the executing Court. Sections 19 and 20 use the expression 'a Court which passed a decree' for the purpose of amending the decree after applying the provisions of the Act. Therefore the *Explanation* was necessary only to define the Court which was to amend the decree and for no other purpose. There is, therefore, no reason to think that the *Explanation* under section 20 referred to the Court only for the purpose of execution. The effect of the *Explanation* is that a statutory definition has been given to the expression ' the Court which passed the decree '. The Court to amend the decree would be that Court which would be the Court for execution under section 37 of the Code of Civil Procedure.

In *Gangaraju* v. *Ramayya*[1], it was held that sections 19 and 20 of Act IV of 1938 should be read together and the explanation of the expression 'a Court which passed the decree' in section 20 would apply to section 19, and that an application to scale down a decree debt and amend the decree could properly be made to the Court of the first instance, although the decree of that Court had been superseded by the decree of an appellate Court. This view was accepted and followed in *Periaswami* v. *Ramaswami*[2], and in *Lingappa* v. *Chinnaswami*[3].

Mr. R. Gopalaswami Iyengar, for the appellant, contended that those decisions should no longer be held to be correct, having regard to the decisions in *Veerappa Chetti* v. *Sivagami Achi*[4], *Palani Mudali* v. *Athiappa Goundan*[5], and *Moideen Batcha* v. *Chidambaram Pillai*[6]. In those cases there were decrees passed by the trial Court before the coming into force of Act IV of 1938. Appeals were filed against those decrees, and the appeals were decided after the Act came into force. It was held that the pendency of the appeal suspended the finality of the decree of the original Court, and that, therefore, an application under section 19 of the Act would not lie to the trial Court, although such decrees had been passed before the Act came into force. It was also held that as by the time the appellate decree was passed the Act had come into force, the relief to which a party would be entitled to under the Act would be to urge before the Appellate Court the plea under the Act, before judgment in the appeal and that section 19 did not authorise the amendment of a decree passed after the Act. None of those cases was concerned with the problem where if both the original and appellate decrees were passed, before the Act, which of the two Courts would have jurisdiction to amend the decree under section 19. The principle that the original decree in a case, where an appeal has also been filed, is suspended, and that the appellate decree would be the only decree between the parties, was invoked in the aforesaid decisions to show that no petition under section 19 would lie to the original Court, although that Court's decree was passed before the Act came into force. That principle would have no application to a case where the appellate decree was itself capable of being amended under section 19. To such a case the decision in *Gangaraju* v. *Ramayya*[1], would apply. That decision has been accepted and acted upon by this Court for nearly 20 years, and even if we were not convinced of its correctness we would have accepted it if only on the principle of *stare decisis*. We are, however, satisfied that that case has been, if we may say so with respect, correctly decided. It follows that an application under section 19 (1) or 19 (2) has to be made to the Court of the first instance which passed the decree, even though the appellate Court had either affirmed or modified or reversed the decree of that Court. Therefore, the lower Court alone would have jurisdiction to entertain the applications under section 19 (2). C.M.P. No. 571 of 1959 fails and is dismissed.

The learned advocate for the appellant tried to raise the question, whether the respondent had made out his status as an agriculturist on the crucial dates, and whether the decision of the lower Court which held that the respondent was entitled to relief under the Act was not sustainable. We declined, however, to hear him on that point as he had conceded before the Full Bench that the respondent was an agriculturist to whom the provisions of the Act would apply.

It was next contended that, as the decree had become satisfied by payment of money into Court on 24th July, 1947, in accordance with the order in C.M.P. No. 3112 of 1947, there would be no jurisdiction to amend the decree. The argument was based upon the provisions of section 16 of Act XXIII of 1948. That enacts that the amendments made by that Act (which had been incorporated in the main Act (Act IV of 1938)) would apply to three categories of cases mentioned therein There is a Proviso to the section which runs thus :—

Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

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1. (1939) 1 M.L.J. 329 : I.L.R. (1939) Mad. 520.
2. (1940) 2 M.L.J. 513 : I.L.R. (1941) Mad. 53.
3. (1955) 1 M.L.J. 1.
4. (1941) 2 M.L.J. 964.
5. (1942) 2 M.L.J. 599.
6. (1944) 2 M.L.J. 338.

The contention on behalf of the appellant was that the amount deposited in pursuance of the order in C.M.P. No. 3112 of 1947 should be deemed to be money paid under Order 21, rule 1, Civil Procedure Code, and when it was paid into Court, there was a *pro tanto* satisfacation of the decree which would attract the provisions of the Proviso to section 16. Order 21, rule 1, prescribes the modes of paying the money under a decree, and states that all money payable under a decree shall be paid into the Court whose duty is to execute the decree or out of Court to the decree-holder or otherwise as the Court which made the decreedirects. Sub-rule (2) of the provision directs that notice of such payment shall be given to the decree-holder, It is conceded that no such notice was given in the present case.

The learned advocate for the appellant relied upon the decision in *Tata Iron and Steel Company* v. *Baidyanath*[1], where it was held that a payment into Court in satisfaction of the decree created a valid discharge of the judgment-debt, and that the omission to give a notice required by Order 21, rule 1, sub-rule (2), could not affect the discharge. The question in the present case is not whether the payment was invalid or valid in the absence of a notice under Order 21, rule 1(2), but whether the payment of the decree-amount on 24th July, 1947, in pursuance of the order in C.M.P. No. 3112 of 1947 would at all amount to a payment under Order 21, rule 1, as the amount could not be said to have been paid voluntarily or unconditionally. The payments under Order 30, rule 1, are payments which should be unconditional in their nature. Under the order in C.M.P. No. 3112 of 1947 there was an impediment or a restriction against the decree-holder obtaining the money when depcsited in terms of the order. The payment into Court being conditional cannot be held to be one coming under Order 21, rule 1, Civil Procedure Code. In *Sheo Gholum Sahoo* v. *Rahut Hussein*[2], a sum of money was paid into Court on behalf of the judgment-debtor in lieu of security for the purpose of setting aside a sale in execution of a decree pending an appeal against an order directing sale. That appeal ultimately failed. It was held that neither the depositor nor the judgment-debtor could claim to have such deposit refunded. The learned Judges held that so far as the money was concerned when the appeal was dismissed, it must be taken to have been transferred to the credit of the decree-holder.

In *Ramayya Aiyer* v. *Gopalier*[3], there was an order for the arrest of the defendant before judgment. To obviate the arrest a sum of money was deposited into Court. It was held that the money which was paid into Court to the general credit of the action, was charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour, and that the judgment-debtor's representative would have rights only subject to the claims of the plaintiff.

The two cases referred to above were concerned with the attempts on the part of the judgment-debtor or his representative to take away monies deposited for the benefit of the decree-holder or the plaintiff. It was held that during the pendency of the proceedings or action there was a lien or charge in favour of that person and on his succeeding in the proceedings in Court, the amount stood transferred to his credit. Another aspect of the matter is involved in the present case, that is, when does the decree-holder become absolutely entitled to the monies ? His title would commence only when the judgment-debtor's title ends, that is on the termination of the proceedings in his favour.

Where money is deposited under an order of Court, the terms of the deposit would be governed by the order. If, for example, an order grants only a time for deposit with no other restriction, the deposit made would go in satisfaction of the decree. If, on the other hand, the order imposes a condition on the decree-holder drawing the money like furnishing of security, there would be an impediment to the satisfaction of the decree. The mere fact that the decree-holder furnished security would not affect the question as by the order of the Court it could be deemed to have been made only provisionally subject to the result of the pending proceedings. The

1. (1921) I.L.R. 2 Pat. 754.
2. (1878) I.L.R. 4 Cal. 6.
3. (1918) 35 M.L.J. 355 : I.L.R. 41 Mad. 1053.

principle of the decision in *Sheo Gholam Sahoo* v. *Rahut Hussein*[1], and *Ramayya Aiyer* v. *Gopalier*[2], will, however, apply to these cases and if the proceedings terminate in favour of the decree-holder, the monies would stand transferred to him on the date thereof. The conditions imposed by the order would then cease.

In the present case, when the money was deposited on 20th August, 1947, it was done in pursuance of the order in C.M.P. No. 3112 of 1947. That order placed a restriction on the appellant drawing the money. That could not be held to be a deposit under Order 21, rule 1, Civil Procedure Code, but one under the order of the Court. The money deposited could be deemed to be a payment to or a realisation on behalf of the appellant only on 14th September, 1951, when the appeal was disposed of. By that time the Act XXIII of 1948 had come into force, and therefore the Proviso to section 16 of that Act would not apply to the case. It follows that the money which was paid by the respondent into Court was realised by the appellant only after the commencement of the Act, and that the Proviso to section 16 would not apply to such a case.

It was next contended on behalf of the appellant that the provisions of section 19 (2) of the Act would not apply to the instant case, as the decree was not one for the repayment of a debt payable before Act IV of 1938 came into force. Section 19 (2) states that the provisions of sub-section (1) shall also apply to cases where after the commencementof the Act a Court has passed a decree for the repayment of a debt payable at such commencement.

In *Govindaswami Goundar* v. *Ramaswami Goundar*[3], it was held that the expression ' payable at such commencement ' would mean payable at the commencement of Act IV of 1938, that is 22nd March, 1938.

The question for consideration would then be whether the debt in respect of which the decree had been passed in the instant case was one payable at such commencement, that is, at the commencement of Act IV of 1938.

The term 'debt' has been defined in section 3 (*iii*) as meaning "any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a Civil or Revenue Court or otherwise, but does not include rent......" Under the definition a debt is one which is due from an agriculturist.

The learned advocate for the respondent contended that the debt which was payable in future would be a debt that would be due and in support of that proposition cited *Banchharam Majumdar* v. *Adyanath Bhattacharjee*[4], where it was held that a sum of money which was certainly and in all events payable was a debt, without regard to the fact whether it was payable then or at a future time. That may be so. But the question in the present case is whether the debt was one which would come within the provision of section 19 (2) of the Act. Section 19 (2) restricts the power of amendment by the Court, to a case where the debt was payable before the commencement of the Act.

We have already referred to the fact that in the present case the decree was passed on the basis of a deposit made by the appellant's father with the respondent's father, and that the demand for the return of the money was made on 2nd October, 1944. If the debt became payable only on demand, it would follow that there was no decree in respect of a debt payable at the commencement of Act IV of 1938. To such a case the provisions of section 19 (2) would not in terms apply. It becomes, therefore, relevant to consider the nature of a deposit and when it becomes payable.

The receipt of an amount by a banker constitutes him a debtor to the depositor and the money deposited would be payable as a debt either on demand or on the conditions stipulated between the parties.

In Sheldon on 'The Practice and Law of Banking" 6th Edition, at page 221, it is stated thus :

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1. (1878) I.L.R. 4 Cal. 6.
2. (1918) 35 M.L.J. 355 : I.L.R. 41 Mad. 1053.
3. (1958) 2 M.L.J. 185.
4. (1909) I.L.R. 36 Cal. 936.

"When a customer pays in money on deposit, the money cannot be considered as a fund held by the banker in trust for the customer. It is merely a loan to the banker and the customer is entitled to no more than the repayment of an equivalent sum at the time which the agreement between the two parties specifies."

A deposit is generally agreed to be paid either (*i*) on demand, or (*ii*), on notice of a stipulated period or (*iii*) after a fixed period. There is no doubt that in the last of the cases mentioned above the money would not become payable except after the stipulated period. It is contended for the respondent that in the first two cases demand would not be a condition precedent for claiming the money payable as the words ' payable on demand ' should be interpreted as meaning payable immediately. We cannot agree with that contention.

In *Mohammad Akbarkhan* v. *Attarsingh*[1], Lord Atkin observed that a demand by a depositor would be the normal condition of the obligation of the depositee to repay. His Lordship stated further :

" Was this then a loan or was it a deposit payable on demand? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed terms does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay ".

In *Ramaswami Chetti* v. *Manickam Chetti*[2], it was held that the right to sue in a case of deposit did not accrue till there was a demand and a refusal. The obligation of a debtor in regard to a deposit has been considered by the Privy Council in *Suleman Haji Ahmed Umer* v. *Abdulla Haji Rahimtulla*[3], where it was held that the test to decide whether the transaction was a loan or deposit, was to ascertain whether on the admitted facts there was an obligation on the part of the debtor to seek out the creditor and repay him, or whether he was to keep the money till the creditor applied for, and whether in a case there was no duty on the part of the debtor to seek out his creditor and repay him but only to do so if and when the creditor requested the payment, the case was one of a deposit. It would follow that there would be no obligation on the part of the depositee to pay the money to the depositor unless the terms of the contract of deposit were fulfilled, and in a case of deposit payable on demand unless a demand had seen made.

It was contended on behalf of the respondent that, although the money was payable under the deposit only on demand, there was no prohibition on the depositee from paying the money at any time he chose, and that as the amount so deposited could have been paid by the depositee at any time, it should be held that the money was one that was payable to him immediately after the deposit was made. He contended that the words ' payable before the commencement of the Act ' occurring in section 19 (2) of the Act would mean money that could have been paid at the option of the debtor. That is not correct. The word ' payable ' in that section would indicate money which the debtor was liable or obliged to pay. A mere option in the banker or debtor to pay cannot render the amount as one 'payable.'

It was then contended that in case of a deposit which was payable on demand, no actual demand was necessary as the Courts have entertained suits without the formality of demand or proceeded to attach or issue garnishee orders in respect of deposits in the hands of the depositees at the instance of a creditor of the depositor. In support of the contention reference was made to the decision in *Guntur Narasimham* v. *Nyapati Narayana Rao Garu*[4], where Venkatasubba Rao, J., observed that the making of the demand was entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged, and a suit might be

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1. (1936) 71 M.L.J. 712 : I.L.R. 17 Lah. 557 (P.C.).
2. (1938) 1 M.L.J. 56.
3. (1940) M.W.N. 1000.
4. (1925) 92 I.C. 405.

instituted without even a demand being made, in which case no question of limitation would arise, and the filing of the suit would itself amount to a demand. In *Allah Ditta* v. *Sadhu Shah*[1], it was held that in regard to a deposit, even if no demand was made, the plaintiff should not be non-suited in the absence of any demand as the bringing of the suit would itself constitute a demand. In our opinion, these decisions cannot and do not support the proposition contended for, namely, that money in respect of the deposit would become " payable " without a demand. They only state the proposition that where a suit had been filed the plaint in the suit could be deemed to be a demand, thus emphasising the necessity of a demand in respect of money due in regard to a deposit.

Deposits standing to the credit of a debtor could be attached in execution and the issue of a garnishee order would depend on the terms on which the deposit was held. That would depend on the debt being due or accruing due. A deposit payable on demand, on notice for a fixed period which had been given or one repayable at a future date would be attachable.

In *Joachimson* v. *Swiss Bank Corporation*[2], it was held that the service of a garnishee order *nisi* was equivalent to a demand. In *Jagannath* v. *Ram Dulari*[3], it was held that the word ' demand ' when used in connection with a deposit really meant what it stated, that is, that the deposit was to be paid only when demanded. A demand would, therefore, be essential to make a deposit payable on demand " payable ". Therefore, in the absence of a demand the debt could not be held to be payable. There is little doubt on the facts of the case that the money entrusted to the respondent's father was a deposit with a banker, which was not made payable until there was a demand therefor. It follows that it became payable on 2nd October, 1944. The provisions of section 19 (2) would not, in our opinion, apply to such a case. The decree in respect of such a transaction would not be liable to be scaled down.

The result is that the order allowing an amendment of the decree under section 19 (2) cannot be justified and it is set aside. The appeal is allowed with costs.

P.R.N. ——— *Appeal allowed; Order set aside.*

HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMASWAMI.

Kamaraj Goundar and others .. *Appellants**.

Penal Code (Act XLV of 1860), section 34—Scope—Acts by several persons in furtherance of common intention—Liability—Criminal trial—Identification parades—Evidentiary value—Parades—How to be conducted.

Section 34 of the Penal Code requires that there must be a general intention shared by all the persons concerned in the offence, that is to say, when several persons unite with a common purpose to do any criminal offence, all those who assist in the accomplishment of the object would be equally guilty. Therefore the foundation of the constructive liability is the common intention animating the accused to the doing of the criminal act and the doing of such act in furtherance of such intention.

Precautions to be observed in and evidentiary value of identification parades discussed.

Appeals against the Judgment of the Additional Sessions Judge of the Court of Session of the Madurai Division, in Case No. 151 of the Calendar for 1958.

K. V. Sankaran and *S. Mohan Kumaramangalam*, for Appellants.

The Public Prosecutor (*P. S. Kailasam*) for the State.

The Court delivered the following

JUDGMENT.—These are connected appeals preferred against the convictions and sentences by the learned Sessions Judge of Madurai Division, in Sessions Case No. 151 of 1958.

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1. (1933) 147 I.C. 338.
2. L.R. (1921) 3 K.B. 110.
3. A.I.R. 1956 All. 63.

* Criminal Appeals Nos. 81 to 83 of 1959. 29th July, 1959. (7th Sravana—1881, Saka.)

The facts are : P.W. 4 is the wife of accused 1 and the sister of P.W. 5, the husband of P.W. 3. P.W. 4 and accused 1 lived as husband and wife for six months or one year in P.W. 5's house eking out their livelihood as agricultural labourers. This married life proved unhappy. They separated. Accused 1 went back to his village and P.W. 4 continued to live with P.W. 5. There was a subsequent Panchayat to reconcile the couple and this failed.

On Friday, 10th May, 1957, at about 11 A.M. accused 1 accompanied by accused 2 and 3 came to P.W. 5's place and in the presence of P.W. 6 wanted P.W. 5 to send back P.W. 4 with accused. P.W. 5 promised to do so after the inauspicious days (Dog Days) were over. Accused 2 insisted on P.W. 5 sending P.W. 4 with accused 1 forthwith. P.W. 6 interceded and advised that it would be more proper if the parents-in-law of P.W. 4 came and took P.W. 4 to the village of accused 1. Accused 1 to 3 left the place.

This tragic occurrence took place on the night of 10th May, 1957. P.W. 5 had left his house to attend Veerapandi Mariamman festival. His wife P.W. 3, and his sister P.W. 4 remained in the house. At about 9 P.M. P.W. 4 alone was inside P.W. 5's house. P.W. 3 was standing at the threshold of the opposite door neighbour P.W. 7. Then P.W. 3 noticed accused 1 to 3 entering P.W. 5's house. Then she heard the cries of P.W. 4 that they were attempting to stab her. P.W. 3 raised an alarm. Accused 1 to 3 rushed out of P.W. 5's house. P.W. 1, the next door neighbour, who was taking his food in his house, came out on hearing the cries of P.Ws. 3 and 4 and noticed accused 1 to 3 running away from P.W. 5's house armed with knives in single file. P.W. 1 chased and caught hold of accused 3 who apparently lagged behind the others. Accused 3 freed himself by stabbing P.W. 1 on his right wrist. P.W. 1 cried out. P.W. 2 attracted by the cries of P.W. 1, while he was returning from a betel-nut shop, tried to stop accused 2. Accused 2 stabbed P.W. 2 and made good his escape. P.W. 2 sustained a bleeding injury on his right thumb and a scratch on his left thigh. P.W. 2's shirt M. O. 3 and dhoti M. O. 4 were got torn in his vain attempt to restrain accused 2. Then Bapuchami the deceased, a resident of the same street, who had also been attracted by these cries came there and attempted to stop accused 1 by catching hold of his legs from behind. Accused 1 stabbed Bapuchami repeatedly on his back with a knife. Accused 2 and 3 are also stated to have stabbed Bapuchami on his back in turn. Bapuchami let go the legs of accused 1 and fell down. The accused made good their escape with their weapons. Then as to what happened, the following is the summary of the evidence.

P.Ws. 1 and 2 went near Bapuchami. A crowd gathered. P.Ws. 7 and 10 who came there questioned Bapuchami separately and the latter told them that accused 1 and his two men had stabbed him and run away. P.W. 10 questioned P.Ws. 1 and 2 also. As Bapuchami had by then become dazed and weak, P.W. 10 recorded a statement Exhibit P-1 from P.W. 1. Thereafter P.Ws. 1 and 10 went and reported the occurrence to the village Munsif at Odaipatti, a mile away. The Village Munsif P.W. 11 received Exhibit P-1 from P.Ws. 1 and 10 at 11 P.M. He ascertained from them that Exhibit P-1 had been written by P.W. 10 to the dictation of P. W. 1. He asked P.W. 10 to make an endorsement to that effect on Exhibit P-1. Then accompanied by his Talayari and P.Ws. 1 and 10, P.W. 11 came to the scene. The three injured persons, *viz.*, P.Ws. 1 and 2 and Bapuchami, were taken to the Chinnamanur Police Station by the Talayari who handed over P.W. 1's statement Exhibit P-1 and the Village Munsif's report to the Head Constable P.W. 14. After a case was registered, the injured persons were sent to the hospital where the doctor examined them and issued the wound certificates Exhibits P-22 to P-24. On P.W. 1 there were two incised wounds on his right wrist, while on P.W. 2 there was one incised wound on his right thumb. On Bapuchami there were five incised wounds on the back. P.W. 16, the Sub-Inspector of Police, Chinnamanur, came to the hospital at 3-15 A.M. and took up investigation. He examined Bapuchami and P.Ws. 1 and 2. The statement of Bapuchami recorded by the Sub-Inspector is Exhibit P-20. As the condition of Bapuchami was serious, the Police, at the suggestion of the doctor, sent for the local Sub-Registrar, P.W. 9, who recorded the statement

Exhibit P-11 from Bapuchami at 4-40 A.M. Thereafter Bapuchami was sent along with the Constable P.W. 13 to the Uthamapalayam Hospital for further treatment. On the way, about two furlongs from Chinnamanur, Bapuchami died.

On the local doctor informing P.W. 16 of Bapuchami's death, the latter went to the spot on the road-side and held inquest. The dead body was then sent through P.W. 13 to the Uthamapalayam Hospital where P.W. 17, the Medical Officer, conducted autopsy. He found five stab injuries on the back of the deceased which had injured the left lung, left diaphragm and left kidney, and had brought about death on account of shock and hæmorrhage.

In the course of the investigation P.W. 16 made enquiries in the village of accused 1 and on 20th July, 1957, the description of accused 2 and 3, who were not known to the P.Ws. before and who are the residents of another village, Kanjampatti, were ascertained and they were looked for. They were absconding. Accused 1 surrendered before the District Magistrate, Madurai, on 26th July, 1957. Accused 2 was arrested by P.W. 15 near Narayanathevanpatti on 2nd August, 1958 and accused 3 was arrested by P.W. 15 at Solaivanpatti on 25th August, 1958.

Inasmuch as accused 2 and 3 were not known to the P.Ws. before, identification parades were held by the Sub-Magistrate of Periakulam, P.W. 8, at which P.Ws. 1 to 3, 5 and 6 identified accused 2 and 3. The final charge-sheet against the three accused was filed on 6th September, 1958, about 16 months after the occurrence.

The case for the accused was as follows : Accused 1 stated that he and his wife, Kamuthayee, have been continuously living together only in Nagalapuram and that the prosecution case concocted by P.W. 5 was false. Accused 2 and 3 denied knowledge of the occurrence.

No witnesses were examined on behalf of the accused.

The learned Sessions Judge found all the three accused guilty under section 302 read with section 34, Indian Penal Code and sentenced them to imprisonment for life. He also convicted accused 2 and 3 under section 324, Indian Penal Code and sentenced them to rigorous imprisonment for six months each, which sentences were made to merge with the imprisonment for life.

On a review of the entire circumstances of the case, we have come to the conclusion that the prosecution has affirmatively and satisfactorily proved the case against accused 1 under section 302, Indian Penal Code and that the prosecution has not brought home the offences for which accused 2 and 3 have been convicted, to them beyond reasonable doubt. We shall set out our reasons in two parts.

Accused 1 had a motive to commit the offence, because when he was running away after creating the *galatta* in the house of P.W. 5, he has been caught hold of by the deceased and in order to free himself he has repeatedly stabbed the deceased on his back and succeeded in freeing himself. Otherwise, he had no motive to commit the offence, since Bapuchami was a stranger so far as accused 1's quarrel with his wife, and which was the reason for accused 1 coming to the house of P.W. 5 that night, was concerned. The stabbing of the deceased by accused 1 has been witnessed by P.Ws. 1, 2, 6, 7 and 10. P.Ws. 1 and 2 are independent, disinterested witnesses who are not related to or otherwise interested in either party. P.W. 3 saw accused 1 running away armed with a knife. The deceased Bapuchami within a few minutes after the occurrence had told P.Ws. 7 and 10 that it was accused 1 who stabbed him. P.W. 1 in his report Exhibit P-1 has mentioned this accused 1 by name as the assailant of Bapuchami. Bapuchami himself has mentioned in his dying declarations Exhibits P-20 and P-11 that accused 1 stabbed him. Accused 1 is not a stranger to Bapuchami. He is the husband of P.W. 4 and the brother-in-law of P.W. 5. As such he is known to the villagers. There is no motive for Bapuchami to falsely implicate accused 1. Accused 1 immediately after the commission of the offence was absconding. He surrendered before the District Magistrate of Madurai, on 26th July, 1957. The net result of this analysis is that the learned Sessions Judge was fully justified in holding, so far as accused 1 is concerned, that

there is sufficient and in fact overwhelming evidence, disinterested and impartial, to establish that it was he (accused) who stabbed repeatedly Bapuchami on his back.

The learned advocate Mr. Kumaramangalam urged that when three persons have participated in the stabbing of Bapuchami and it cannot be said that it was the stab of accused 1 which caused the fatal injury, he (accused 1) could not be convicted for an offence under section 302, Indian Penal Code, but only for the lesser offence under section 324 or 326, Indian Penal Code. We are unable to accept this contention for two reasons. This is not a case like *Pandurang* v. *State of Hyderabad*[1]. In that case five persons were alleged to have attacked the deceased with lethal weapons like axes and sticks. One Tukia struck the deceased on the cheek and the medical evidence showed that the blow could have caused the death. Another accused Pandurang hit the deceased on the head which resulted in two injuries. The medical opinion in regard to those injuries was that they would not have resulted in the death. After those blows were inflicted, the deceased fell down and one Bhilia hit the deceased on the neck which resulted in his death. The Supreme Court held that Bhilia was guilty of murder under section 302, Indian Penal Code. As regards Tukia they took the view that the injury inflicted by him on the cheek was a fatal one, and convicted him under section 302, Indian Penal Code. In *Pandurang's case*[1] a constructive liability was sought to be fastened for the offence of murder but that was negatived. But in the instant case the facts are different. The evidence clearly shows that even before accused 2 and 3 ran up to Bapuchami, accused 1 had stabbed 2 or 3 times on the back of the deceased. The evidence is that it was a bright moonlight night. The witnesses who saw the stabbing were at close quarters. The evidence of the doctor shows that this stabbing must have brought about internal injuries and that all the internal injuries could have been caused by a single stab if the blade of the knife was long enough and the cut sufficiently forcible and that the injuries could have been caused even if the victim had been standing, as it happened when accused 1 stabbed Bapuchami. Therefore, on the short ground that the repeated stabbing on the back of the deceased by accused 1 could alone account for the fatal termination, accused 1 would be plainly guilty of the offence of murder without invoking section 34, Indian Penal Code.

The question then arises as to the scope of section 34, Indian Penal Code, in a case of this nature. Section 34, Indian Penal Code, runs as follows :—

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if it were done by him alone."

This section requires that there must be general intention shared by all the persons concerned in the offence, that is to say, when several persons unite with a common purpose to do any criminal offence, all those who assist in the accomplishment of the object would be equally guilty. Therefore, the foundation of the constructive liability is the common intention animating the accused to the doing of the criminal act, and the doing of such act in furtherance of such intention. It follows therefore, that common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention. In *Barendra Kumar Gosh* v. *Emperor*[2], Lord Sumner stated at page 211 thus :

"Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it."

The Privy Council pointed out that the object of the section was to punish participants by making one man answerable for what another did, provided what was done in furtherance of a common intention, and observed thus at page 217 :

"In other words, 'a criminal act' means that unity of criminal behaviour, which results in some thing, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

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1. (1955) S.C.J. 106 : (1955) 1 S.C.R. 1083 : A.I.R. 1955 S.C. 216.

2. (1924) 48 M.L.J. 543 : L.R. 52 I.A. 40 : I.L.R. 52 Cal. 197 (P.C.).

It is therefore clear that there would be no liability by reason of section 34 except in a case where there was a common intention to commit the particular offence which resulted. A similar intention would not be enough to bring the case within the meaning of the section. Suppose several persons, each acting independently of the others, intend to commit a crime and all of them choose the same moment and commit the crime which each of them intended separately. There would be no common intention in such a case. Each of them would be liable for his act, but not vicariously for the act of another or other. To constitute a common intention, a community of intention is necessary. In *Mahbub Shah* v. *The King Emperor*[1], the Privy Council laid down that section 34 enacted a principle of joint liability in the doing of a criminal act, that the essence of that liability was to be found in the existence of a common intention animating the accused leading to the doing of criminal act in furtherance of such intention and that to invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. On that principle it was held that common intention within the meaning of the section implied a pre-arranged plan and to convict the accused of an offence, it should be proved that the criminal act was done in concert and pursuant to the pre-arranged plan. Their Lordships of the Privy Council held that the inference of common intention should never be reached unless it was a necessary inference from the circumstances of the case. The Privy Council, however, pointed out that although it might be difficult or if not impossible to procure direct evidence to prove the intention of an individual, and in most cases it had to be inferred from his act or conduct or other relevant circumstances of the case, the inference of common intention within the meaning of section 34, Indian Penal Code, should never be reached unless it was a necessary inference deducible from the circumstances. Mr. Kumaramangalam, the learned advocate for the accused, put before us an appropriate illustration in regard to this matter. He instanced the case of two persons inflicting without pre-concert, at the same time, injuries on a person, the injury inflicted by one of whom being simple and the injury inflicted by the other resulting in the death of the person. There is no doubt that in such a case the intentions are different and the first of them could not be charged with the constructive liability for the murder, and he would be guilty of causing only simple hurt, while the other accused would be guilty of the offence of murder. If, however, in that illustration there was a pre-arranged plan to kill the person, the fact that the first of them inflicted only a simple injury would make no difference in the guilt between the first and second accused. The second would be guilty of murder, while the first will be constructively liable for the act of the second. In *Pandurang* v. *State of Hyderabad*[2]. Bose, J., summarised the position thus :

"Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of common intention of all of them, *Mahbub Shah* v. *Emperor*[1]. Accordingly, there must have been a prior meeting of minds, several persons can simultaneously attack a man and each can have the same intention namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have common intention required by the section, because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others ; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Gosh* v. *Emperor*[3] and *Mahbub Shah* v. *King Emperor*[1]. As their Lordships say in the latter case, 'the partition which divides their bounds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice.' "

Bearing these principles in mind if we examine the facts of this case, there cannot be the slightest doubt that this accused 1 as well as two other persons who had come armed to commit an offence in the house of P. W. 5 were surprised in the

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1. (1945) 2 M.L.J. 144 : L.R. 72 I.A. 148 : I.L.R. (1945) Kar. 210 : A.I.R. 1945 P.C. 118 at pp. 120, 121.
2. (1955) S.C.J. 106 : (1955) 1 S.C.R. 1083 : A.I.R. 1955 S.C. 216.
3. (1924) 48 M.L.J. 543 : I.L.R. 52 Cal. 197 : L.R. 52 I.A. 40 (P.C.).

attack and had to break out and make good their escape. They were sought to be prevented by a number of persons and there has been a meeting of the minds of all these three persons together to the extent of doing away with the persons restraining them and effect their escape at all costs. That is why when accused 1 had stabbed Bapuchami repeatedly on the back and had not completely succeeded in freeing himself, the other two persons joined accused 1 and contributed their own stabbings which resulted in Bapuchami let go accused 1. All the three made good their escape with their weapons and remained at liberty for some time. Therefore, this accused 1 would also be guilty under section 302 read with section 34, Indian Penal Code. His conviction is correct and the sentence is appropriate. Both are confirmed and the appeal of accused 1, C.A. No. 81 of 1959, is dismissed.

In regard to accused 2 and 3, the evidence against them is identification by P.Ws. 1 to 3, 5 and 6 and their pointing out these accused as two of the three culprits at the identification parade held by P.W. 8 on 6th August, 1958.

Identification (Latin : *idem*, the same) means the process of establishing the identity of a person, or, in other words, the determination of his individuality, by proving that he is the man he purports to be, or, if he is pretending to be some one else, the man he really is, or in case of dispute, that he is the man he is alleged to be.

The evaluation of identification evidence is perhaps one of the most difficult problems which confront a Judge when we remember the extent of human fallibility and the fragility of memory and the tricks played by our senses. It can cause us no surprise that in England and America it has been found that the major sources of miscarriage of justice are due to wrong identification. Dwight Mccarty's American Classic, Psychology for the Lawyer (New York Prenlice Hall In C. 1929) in Chapter VII, p. 2051 foll.) and Prof. Glanville Willams in Proof of Guilt (Hamlyn Lectures) at page 83 and foll., "identification evidence" have expounded the manifold inaccuracies of recall. Therefore identification evidence should be examined with great care.

In criminal cases identification parades have to be held to establish the identity of the culprit. Identification parades are held not for the purpose of giving defence advocates material to work upon, but in order to satisfy investigating officers of the *bonâ fides* of the P.Ws. and that they are on the right track. (*State* v. *Ghulam*[1]).

The result of the identification parade conducted at the stage of investigation is not a piece of substantive evidence and cannot be the basis of a conviction by itself. The evidence against the accused must be the evidence given by the identifying witness in the witness-box. It, however, provides a very good piece of corroborative evidence and greatly enhances the credibility of the evidence of identification given in Court. In fact, mere evidence of identification in Court in the absence of a prior identification test is of very little consequences. The mere fact that a person is in the dock as an accused is likely to influence the mind of a witness and make him think that the person in the dock is the person he had seen committing the crime and thus reduce the evidentiary value of the identification evidence given in Court: *Shiam Lal* v. *Rex*[2]; (*See also* Prof. Glanville Williams 'Proof of Guilt' *supra*). Although the accused may have no right to claim an identification parade, if the prosecution turns down his request for identification, it runs the risk of the veracity of the eye-witnesses being challenged on that ground : *Lajja Ram* v. *State*[3].

The whole idea of a test identification parade is to see if the witness who claims to have seen the accused at the time of the occurrence can identify him from amongst others without the aid from any other source. If he can, then it becomes more or less certain that the evidence of identification as deposed to by the witness is genuine. Before the evidence of identification given in Court can be accepted as sufficient

1. A.I.R. 1951 All. 475.
2. (1953) Crl.L.J. 367.
3. (1955) Cr.L.J. 1547.

to establish the identity of an unknown accused, it is necessary to see that there is some good corroborative evidence in support of the evidence of identification in Court. And such corroborative evidence usually comes from the evidence of the test identification where the witness picks up the accused from amongst a number of persons with whom he is mixed up. True, the evidence of the witness having identified the accused at a test identification parade has no substantive value, but is very important corroboration of his testimony in Court: *Pravash Kumar* v. *The King*[1]. Thus, in the absence of test identification proceedings the mere *ipse dixit* of the witness that the accused was one of the culprits could not be believed at all: *Birey Singh* v. *State*[2].

So, where the culprits are unknown to the witnesses but the witnesses say in course of their examination by the investigating officer that they would be able to recognise some of the criminals, if shown, a test identification parade of the suspects ought to be held at the earliest possible opportunity whenever possible before a Magistrate. In *Awadh Singh* v. *The State*[3], it was held that non holding of a test identification parade, though may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification.

It need hardly be said that evidence of identification whether of the accused or of the recovered properties, before a Police Officer amounts to a statement within the meaning of section 162 of the Code of Criminal Procedure and as such becomes inadmissible in evidence, *Ram Krishnan* v. *State of Bombay*[4]. See also *In re Venkata Subbiah*[5], and *Santa Singh* v. *State of Punjab*[6].

The suspect should be mixed up with a fairly large number of persons of similar status and dress and the witnesses should be called one by one so that identification by one witness may be conducted out of the sight and hearing of other witnesses. The proportion of outsiders to be mixed with the persons to be identified must be sufficiently large to eliminate the chance of the accused being picked up by chance. Where, therefore, six suspects were mixed up with only seven outsiders, it was held that the chances were all in favour of the witnesses picking up the accused in view of their number being almost equal to the number of outsiders and as such the Court would not rely much on this sort of an identification parade: *Bhagu Ranchhod* v. *State*[7]. It should also be remembered that if too large a number of persons is mixed with the suspects, there might be a danger of putting too much strain on a witness's ability to pick up a suspect. In such a case he will get easily bewildered. Where the proportion of suspects to under-trials bore the ratio of 5:1, it was held that the identification parade was a fair one: *Dal Chand* v. *State*[8], *Ranjha* v. *State*[9], *State* v. *Wahid Bax*[10]. In *Satya Narain* v. *State*[11]. Desai, J., has, however, held that this proportion should at least be 9:1.

It has been held in a number of cases that the value of a test identification parade is much less if it is held a considerable period after the arrest of the accused: *Debi* v. *State*[12], *Kasim Razvi* v. *State of Hyderabad*[13]. So also is the case if the test identification parade is held long after the occurrence. Where, therefore, the test identification was held fifteen months after the occurrence, the evidence of identification was looked at with an eye of suspicion.

"Human memory is fallible. It is sometimes difficult to identify a person not very well known whom one sees with a rather different appearance about fifteen months later after the crime has occurred", *Davrao Singh* v. *State*[14].

Test identification parade should be arranged early, at any rate, before the accused goes on bail: *Hazara Singh* v. *State*[15], *Ganga Singh* v. *State*[16]. In fact Courts

1. 52 Cr.L.J. 819.
2. 1953 Cr.L.J. 1817.
3. 1954 Crl.L.J. 1546.
4. (1955) S.C.J. 129: 1955 Crl.L.J. 196 (S.C.).
5. 1955 Cr.L.J. 1152.
6. A.I.R. 1956 S.C. 526: 1956 Cr.L.J. 930 (S.C.).
7. 1955 Crl.L.J. 31.
8. 1953 Cr.L.J. 356.
9. 1952 Cr.L.J. 15.
10. 1953 Cr.L.J. 705.
11. 1953 Cr.L.J. 848.
12. 1953 Cr.L.J. 447.
13. 52 Crl.L.J. 1123.
14. 1952 Cr.L.J. 265.
15. 52 Cr.L.J. 492.
16. 1956 Cr.L.J. 181.

ought to refuse bail if an identification parade is going to be and ought to be held. So, not only the test identification parade has to be arranged at the earliest possible opportunity but bail will have to be opposed strenuously until the test identification parade is finished.

As regards the actual conduct of the identification proceedings, the following hints or precautions should be noted or observed : (1) selection for parade of only non-suspects of the same religion. (2) Securing of privacy from view at parade. (3) Exclusion of every one, especially the Police from the proceedings. (4) Seclusion till the completion of the proceedings of each witness finished with from others whose evidence has to be taken yet. This precaution should exclude possibility of prearranged signals like touching the ear, or cough, etc., when the identifying witness reaches the culprit in the parade. We may point out here that the value of the identification parade is very much depreciated as regards sub-jails where cells are directly visible to the public. Secondly, the Police guard may not unoften be privy to surreptitious identification beforehand of suspects by the witnesses. Thirdly, suspects when being exercised or taken to the latrine or kitchen run the risk of being pointed out beforehand to the identifying witnesses. In such cases a searching examination of the identifying witnesses as regards the time of their arrival, the place where they stayed, their visits to the Police, etc., may prove useful. (5) Changing the place or places of persons to be identified at discretion before arrival of each witness. (6) Definite information is required in cases where witness admits prior acquaintance or meeting with any subject he identifies. (7) Recording any well-founded objection by any suspect to any point in the proceedings.

In *Abdul Munim Khan* v. *State of Hyderabad*[1], it has been held that the desirability of exercising a most careful scrutiny about identification parades cannot be over-emphasised. It is the duty of the Magistrate conducting the test identification parade to see that all precautions are taken in the matter of satisfying himself that the witnesses had no opportunity to see the accused before. Even the omission to observe a minor necessary procedure, at the time of holding the identification parade would detract from its value. The proceedings should be conducted in such a way as not to leave any room or loophole to create the slightest suspicion in the mind of the Court. The Officer, conducting the test identification parade, should, therefore, exercise the utmost scrutiny and vigilance at the time of the test identification parade. See also *Samsunder Singh* v. *State*[2]. It has been held in *Madan Singh* v. *State*[3]:

> " If the evidence of identification is satisfactory and leaves no doubt that the witnesses who claim to have identified the accused must have done so, there is no reason why conviction should not be recorded merely on the strength of that evidence ".

Bearing these principles in mind, see the illuminating discussion in Chief Justice Munir's "Principles and Digest of the Law of Evidence," IV edn. (1956): "Evidentiary Function of Identification Tests and Evidentiary Value of Identification Tests" and Justice V. B. Raju, I. C. S., "Evidence Act," pages 49 to 57. If we examine the facts of this case, we find that the evidence of identification cannot be safely made the basis for resting the conviction. Accused 2 and 3 were persons unknown to these witnesses before the occurrence. Though there was bright moonlight, these witnesses had the opportunity of seeing these fleeing strangers for a very short time. These accused persons also had no distinctive appearances or infirmities which would fix their features indelibly upon the minds of these witnesses. The first information report and the dying declaration do not contain even a description of the two assailants now materialising as accused 2 and 3. These accused have been absconding and the identification parade had been held practically 15 months after the date of occurrence. In these circumstances, it would be unsafe to rest the conviction of accused 2 and 3 upon the identification evidence.

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1. 1953 Cr.L.J. 785.
2. 1953 Cr.L.J. 1452.
3. 1953 Cr.L.J. 100.

The net result of this analysis is that the convictions and sentences in regard to accused 2 and 3 have got to be set aside and are hereby set aside. They are acquitted and set at liberty. C.A. Nos. 82 and 83 of 1959 are allowed.

V.S. *Conviction of accused 1 confirmed and of 2 and 3 set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Muthukumara Padayachi .. *Petitioner**

v.

Sambandam Pillai .. *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 3 (4) (b)—Ascertainment of arrears of rent in kind and direction to pay same to landlord on or before specified date with further order for eviction in default—Legality—Duty of Revenue Court—Determination of fair rent—Retrospective effect—If can be given.

An order of the Revenue Court ascertaining the arrears of rent payable by the tenant in kind and directing that, if the tenant failed to pay the same on or before a specified date and to report the fact, the next day, eviction would follow, is illegal. The ascertainment of the arrears must be in terms of cash and the direction must be to pay into Court and not to the landlord.

A determination of fair rent would hold good for five years after such determination ; it cannot be made retrospective. There is no provision in the Act to make it retrospective.

Petition under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 read with section 115 of the Act V of 1908 and section 25 of Act IX of 1887, praying the High Court to revise the order of the Revenue Court of Kumbakonam, dated 21st February, 1959, made in P. No. 1115 of 1958.

K. Raman, for Petitioner.

T. S. Kuppuswami Iyer, for Respondent.

The Court made the following

ORDER.—This is a petition to revise the order of the Revenue Court, Kumbakonam, in P.No. 1115 of 1958, ascertaining the arrears of rent payable by the petitioner-tenant at 137 kalams and 3 marakkals of paddy and 10 bundles of straw, and directing that, if the tenant failed to pay the same on or before 6th March, 1959 and to report the fact by the next day, eviction would follow. The order, on the face of it, is wrong. There is no ascertainment, in terms of cash, of the arrears of rent. Secondly, the direction has been made for the tenant to pay the landlord and not into Court. It has been held in this Court that such a direction is illegal. The order for eviction could not be sustained on that ground.

But, Mr. K. Raman, learned counsel for the petitioner, has taken another line of attack to the order of the lower Court. Originally, there was a contract of lease, Exhibit P-1, in regard to the property, executed by the tenant in favour of the landholder on 1st June, 1955. Under that document, a fixed rent was payable. The case for the landlord was that the tenant was in arrears for faslis 1366 and 1367 and that about 137 kalams of paddy were due by way of arrears. The case for the tenant was that, although Exhibit P-1 stipulated a fixed rent, the parties subsequently agreed that the lease should be on the basis of a waram system and that he had delivered over the landlord's share of the paddy on the threshing floor at each harvest. This was rejected by the lower Court, and I am of opinion that the lower Court was right in doing so.

The next contention of Mr. Raman was that, in 1958, fair rent has been fixed at the rate of 67 kalams of paddy in respect of the lands covered by the application and that, therefore, the lower Court should retrospectively fix the rent for faslis 1366 and 1367 at the rate of 67 kalams or paddy per year. No provision of law has been

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* C.R.P. No. 506 of 1959. 28th April, 1959.
(8th Vaisakha 1881—Saka.)

referred to me, making the determination of fair rent retrospective. A determination of fair rent will hold good for five years after such determination. But, there is no provision in the Act to make it retrospective. The determination of fair rent in 1958 will be operative only thereafter, and it will not avail the petitioner in regard to the rent payable by him for faslis 1366 and 1367. In view of the fact that I have found that the order of eviction is opposed to law, the order of the lower Court will be set aside to that extent.

The finding that 137 kalams and 3 marakkals of paddy and 10 bundles of straw are the arrears due from the petitioner to the respondent is affirmed. But the lower Court will proceed to assess the value of that quantity of paddy and the 10 bundles of straw and fix a definite time, by which the amount has to be paid into Court, in default of payment of which eviction can be directed.

There will be no order as to costs.

P.R.N. —— *Petition allowed in part: order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

G. Vasantha Pai .. *Petitioner.**

Practice—Expunging remarks and observations in judgment—Powers of High Court—Inherent power to delete remarks about counsel by Judge of High Court in judgment—Duty of Court—Judge interfering in cross-examination of witness by counsel and putting questions to witness himself exclusively—Propriety—Privileges and duty of counsel—Interference by Court in discharge of duty to client—Propriety.

The High Court has undoubted jurisdiction to expunge irrelevant and scandalous remarks made by a subordinate Court against a party or his counsel, particularly when they are likley to cause damage to the reputation of the aggrieved person. As the supreme Court of revision, the High Court must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it.

Panchanan Banerji v. *Upendranath Bhattacharji*, I.L.R. 49 All. 255, *Public Prosecutor*, In re, (1944) 1 M.L.J. 153 : I.L.R. (1944) Mad. 614, *Ramabhadra Naidu* v. *Subramania Iyer*, (1916) 3 L.W. 283 and *State of Bombay* v. *Nilkanth*, A.I.R. 1954 Bom. 65, referred to.

The High Court will not, however, invoke its inherent power to expunge from the judgment of a Judge of the High Court any remarks or observations. A judgment of a single Judge of the High Court, whether it be on the Original Side or on the Appellate Side, in Civil or Criminal proceedings, is a judgment of the High Court and a Division Bench or a Fuller bench of the High Court has no power to delete passages from the judgment of the High Court delivered by a single Judge. The High Court is a Court of record and hence a Division or Fuller Bench can have no power to direct any expunging from the judgment of a single Judge which is a part of the record of the High Court.

The High Court at the same time had no hesitation in the instant case in holding that the adverse comments made by the single Judge on the conduct of the defendant's counsel were wholly unwarranted, and counsel was only doing his duty by his client, and, under the circumstances, that was held to be sufficient to clear the reputation of counsel.

It cannot of course be doubted that a Judge is not entitled but is bound to interfere at any stage of the witnesses' evidence if he feels that it is only by putting questions of his own that he can properly follow and appreciate what the witness is speaking. But such interference should be as infrequent as possible when the witness is under cross-examination. Excessive judicial interruption inevitably weakens the effectiveness of the cross-examination, for at one and the same time it gives valuable time to the witness for thought before answering a difficult question and diverts cross-examining counsel from the course which he had intended to pursue and to which it is by no means easy sometimes to return. If a Judge should himself conduct the examination of witnesses, he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict.

Jones v. *National Coal Board*, (1957) 2 All E.R. 155, *Yuill* v. *Yuill*, (1945) 1 All E.R. 183 and *Ex-parte Lloyd*, (1888) Mont. 70, referred to.

The advoctate owes a bundle of duties, duty to his client, duty to his opponent, duty to the Court duty to the profession and duty to the public and the State. Primarily, his duty is to his client and in the discharge of his duty an advocate enjoys several privileges. He needs to be free of all fear in the performance of his arduous duties and he must not be hampered by any fear of offending the

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* C.M.P. Nos. 7668 and 7669 of 1958. 25th July, 1959.

opposite party or any witness. An advocate cannot be proceeded against civilly or criminally for words uttered in his office as advocate.

Bipinchandra Jaisinghbai Shah v. *Prabhavathi*, (1957) S.C.J. 144, 155; *Zamindar of Tuni* v. *Peda Bannayya*, (1898) 8 M.L.J. 304: I.L.R. 22 Mad. 155 (159), *Sullivan* v. *Norton*, (1886) I.L.R. 10 Mad. 28, *Tiruvengada Mudali* v. *Tripurasundari Ammal*, (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 and *Munster* v. *Lamb*, L.R. (1883) 11 Q.B.D. 588, referred to.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to expunge the remarks and observations against the Petitioner, appearing as counsel for the defendant in suit made by Subrahmanyam, J., in his judgment in C.S. Nos. 54 and 55 of 1957 and O.M.S. No. 9 of 1957, dated 28th October, 1958.

M. C. Setalwad (Attorney-General) for *C. Venugopalachari* and *D. Padmanabha Pai*, for the Petitioner.

V. K. Tiruvenkatachari (Advocate-General) and

V. C. Gopalaratnam.

The Order of the Court was made by.

Rajamannar, C.J.—These are two applications filed by an advocate of this Court to expunge the remarks and observations against him appearing as counsel for the defendant in three suits, C.S. Nos. 54 and 55 and O.M.S. No. 9 of 1957 made by Subrahmanyam, J., in his judgment, dated 28th October, 1958, disposing of the said three suits. A list of ten passages from the judgment is given as containing remarks and observations sought to be expunged. In the above suits the plaintiff was Mrs. Leelie Kuriakose and the sole defendant was her husband, Mr. T. N. Kuriakose. C.S. Nos. 54 and 55 of 1957 were originally filed in the City Civil Court, Madras, but were transferred to this Court on the application of the defendant. In C.S. No. 54 of 1957 the wife prayed for separate maintenance from the defendant on the ground of cruelty and desertion. In C.S. No. 55 of 1957 she prayed for recovery of possession of a car, furniture and wedding presents which according to her were her exclusive property. In O.M.S. No. 9 of 1957 she prayed for a decree for judicial separation and for alimony. The plaintiff is the daughter of Dr. V. K. John, a senior advocate of this Court. The defendant was at the time of trial Deputy Financial Officer in the Southern Railway. The parties were married on 2nd February, 1948. At the time of the marriage the defendant was an Accounts Officer in the Bombay, Baroda and Central Indian Railway. The marriage was celebrated at Madras. After the marriage the husband and wife went to the husband's house and stayed for a short time there. Then they left for Bombay where they lived till 1950 in which year the defendant was transferred to the Southern Railway and posted to Tiruchirapalli. The plaintiff and the defendant were living in the Railway Colony in Golden Rock till 1953. Thereafter the defendant was transferred to Madras. In Madras, the plaintiff and defendant were living for a short period in the Railway Colony at Teynampet and subsequently in a railway bungalow at Sterling Road, Nungambakkam. The residence of the plaintiff's father was three furlongs from where they were staying.

It is common ground that on the 17th January, 1957, the defendant left the plaintiff at her father's house. On the night of 5th February, 1957, the plaintiff came to her husband's house. She was there on the 6th and until the evening of the 7th. That night both the plaintiff and the defendant spent in the house of one V. John, a cousin of the plaintiff. On the 6th of February the plaintiff's father took her to his house from Mr. V. John's house. The plaintiff continued to remain there. The two suits, C.S. Nos. 54 and 55 were instituted in the City Civil Court, Madras, in March, 1957 and O.M.S. No. 9 of 1957 was instituted on 22nd July, 1957.

It is not necessary to set out at great length the several allegations made by the wife against her husband and by the husband against the wife. Suffice it to say that the plaintiff accused the defendant of physical and mental cruelty and des-

ertion which were denied by the defendant. The learned Judge, Subrahmanyam, J., who tried the three suits together found that the defendant was guilty of acts of physical and mental cruelty against the plaintiff and desertion of the plaintiff and that she was entitled to a decree for judicial separation and for permanent alimony. He granted a decree accordingly fixing alimony at Rs. 420 per mensem. In C.S. No. 54 of 1957 the learned Judge passed a decree directing the defendant to pay the plaintiff maintenance at Rs.150 per mensem from 8th February, 1957, to 12th August, 1957. The subsequent period was covered by the decree in the matrimonial suit. In C.S. No. 55 of 1957 the learned Judge passed a decree directing the defendant to deliver to the plaintiff possession of the car or in the alternative to pay the plaintiff a sum of Rs. 7,000 with interest at six per cent. per annum from the date of the claim. He also passed a decree for the return to the plaintiff of her wedding presents but dismissed the claim in so far as it related to the furniture. Appeals from the decrees of the learned Judge in the three suits were filed both by the plaintiff and the defendant, (O.S.A. Nos. 97 and 66 of 1958 and 22 and 23 of 1959). These appeals were heard by us and we have recently delivered judgment in them. We did not accept the findings of the learned Judge as regards physical and mental cruelty and desertion. We dismissed the suit for judicial separation and alimony. We varied the decree in C.S. No. 55 of 1957 in respect of the car and the furniture.

In the affidavit filed by the petitioner in support of his two applications he alleged that the learned Judge had made unwarranted and unjustified remarks and observations against him in the conduct of the suits. He submitted that questions were put by him to the witnesses on facts in issue and relevant facts which made the facts in issue highly probable or improbable and that under no circumstances did he overstep his responsibility as counsel in the case. The questions that were put by him were relevant and were on the instructions of his client. It was his duty to elicit answers from the witnesses regarding all the allegations made in the plaint and the written statement. At no time was any objection taken to the averments made in the written statement in O.M.S. No. 9 of 1957 on the ground that they were scandalous or irrelevant.

The learned Attorney-General who appeared for the Petitioner-Advocate before dealing with the particular remarks and observations to which exception was taken dealt at the outset with certain larger questions of general importance, first on the privileges of the Bar and the important role which an advocate has to play in the administration of justice. Next he dwelt on the role of the Judge in the conduct of the trial and the limits within which he should exercise his undoubted right to examine the witnesses giving evidence before him. The learned Attorney-General deplored the attitude of the learned Judge in his approach to the evidence adduced on the many issues and drew our attention to what according to him was a bias or prejudice in favour of a particular witness.

In our opinion, we are not directly concerned in these two petitions with one aspect of the learned Attorney-General's arguments, namely, the undue interference by the learned Judge with the examination of the witnesses. That has a bearing more on the merits of the findings arrived at by the learned Judge on the main issues. In the judgment delivered by us in the appeals this is what we said condemning the manner in which the learned Judge took over as it were the conduct of the examination of the witnesses.

"Mr. S. Govind Swaminathan, learned counsel for the appellant-defendant, made a grievance that the learned trial Judge interfered too much with the cross-examination of the defendant's witnesses and himself put too many questions to them at vital junctures, preventing effective cross-examination of those witnesses. In mentioning this we should not be understood as commenting upon the conduct of the trial by the learned Judge ; but all the same we find whole pages of the oral evidence occupied by questions put by the learned Judge to defendant's witnesses. No doubt, it is the duty and privilege of a Judge to put any question to any witness at any stage ; but equally it has been all along well understood that that privilege should not be exercised to the detriment of either party. When once these questions became numerous and prolific there is always the impression left in the minds of the parties that the Judge has overstepped the limits of his privilege. We need not say more on this subject, except to indicate our opinion that there is some justification for this complaint of Mr. Govind Swaminathan. This circumstance also detracts from the value of the learned Judge's estimate of the credibility of various witnesses."

. . . .

We shall, therefore, content ourselves with the following extracts from the judgment of Denning, L.J., in *Jones* v. *National Coal Board*[1] :

" In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question "How's that" ? His object above all is to find out the truth, and to do justice according to law ; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Elden, L.C., who said in a notable passage that ' truth is best discovered by powerful statements on both sides of the question.' *See Ex. P. Lloyd*[2] and Lord Greene, M.R., who explained that justice is best done by a Judge who holds the balance between the contending parties without himself taking part in their disputations? If a Judge, said Lord Greene, should himself conduct the examination of witnesses, " he so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. See *Yuill* v. *Yuill*[3].

. . . .

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure ; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition ; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth ; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a Judge and assumes the role of an advocate , and the change does not become him well. Lord Bacon spoke right when he said that : ' Patience and gravity of hearing is an essential part of justice ; and an over-speaking Judge is no well tuned cymbal.'

. . . .

Now it cannot, of course, be doubted that a Judge is not only entitled but is, indeed, bound to intervene at any stage of a witnesses' evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested and it loses much of its effectiveness in counsel's hands if the witness's is given time to think out the answer to awkward questions ; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering difficult question, and diverts cross-examining counsel from the course which he had intended to pursue and to which it is by no means easy, some-times to return ".

Learned Attorney-General dwelt on the position of counsel and the privileges of the Bar. In spite of occasional adverse comments there can be no doubt that the legal profession is a great and noble profession and for that very reason the advocate owes a bundle of duties, duty to his client, duty to his opponent, duty to the Court, duty to the profession and duty to the public and the State. Primarily, however, it cannot be denied that his duty is to his client. An advocate is engaged to represent the case of his client. He is engaged not to express his own views of the case but to marshall all that can be said in favour of his client's view of it. *Vide* Macmillan's Law and other things (Ethics of Advocacy). In the discharge of his duties an advocate enjoys several privileges. The learned Attorney-General cited the early decision of a Full Bench of this Court in *Sullivan* v. *Norton*[4], where it was held that an advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate. The following observations of the Master of Rolls in *Munster* v. *Lamb*[5], were cited and followed :—

" If anyone needs to be free of all fear in the performance of his arduous duties, an advocate is that person. His is a position of difficulty ; he does not speak of that which he knows, but he has to argue and to support a thesis which it is for him to contend for ; he has to do this in such a way as not to degrade himself ; but he has to do it under difficulties which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true,

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1. (1957) 2 All E.R. 155 at 159.
2. (1888) 8 Mont. 70-n.
3. (1945) 1 All E.R. 183 at 189.
4. (1886) I.L.R. 10 Mad. 28.
5. L.R. (1883) 11 Q.B.D. 588

relevant or irrelevant, he could not possibly perform his duty with advantage to his client; and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage of the public."

Whether this privilege is absolute or qualified it is not necessary to decide in these petitions though there have been divergent opinions on the matter and the later Full Bench decision in *Tiruvengada Mudali* v. *Tripurasundari Ammal*[1], has expressed a doubt as to the correctness of the application of the English Common Law doctrine of absolute privilege to criminal law in India. What is, however, relevant to the present discussion is that an advocate in the discharge of his duties to his client must not be hampered by any fear of offending the opposite party or any witness. There are cases in which the subject-matter of the enquiry is such that questions will have to be asked which cannot be fit for the drawing room or which may appear to be scandalous but as pointed out by Subramania Iyer, J., in *Zamindar of Tuni* v. *Peda Bannayya*[2], "What is relevant cannot be scandalous". On this point we might usefully refer to the view which the Supreme Court took of certain questions put by the counsel for the husband in a suit filed by him for dissolution of his marriage with the defendant. There was a letter addressed by the wife to a friend of the husband which was of an amorous nature and capable of furnishing good grounds for the husband to suspect the wife's fidelity. Though adultery as such was not alleged by the husband his counsel put questions suggesting that the letter by implication led to the inference that she might have misbehaved with the husband's friend. The learned Judge of the Appeal Court of Bombay castigated the counsel for the husband for putting such questions to the defendant in cross-examination. But their Lordships of the Supreme Court considered that the criticism was not justified. (Vide *Bipinchandra Jainsingbhai Shah* v. *Prabhavati*[3]).

Before we take up seriatim the passages in the judgment which are sought to be expunged we might make a few general observations. In more than one place the learned Judge has given expression to a feeling that the defendant and his counsel were anxious to create a sensation by slandering the plaintiff and Dr. John. We are convinced that this could not have been so. In paragraphs 9 to 13 of the defendant's written statement in the matrimonial suit there were allegations with reference to which the defendant was anxious that the witnesses for the plaintiff should be cross-examined. When the trial Judge felt disinclined to allow certain questions the defendant made an application (No. 1780 of 1958) and in support of it he filed an affidavit wherein he made it clear that it was not his intention to secure any publicity. He said :—

"It should not be understood that I am desirous of slinging any mud on anybody but my anxiety is to see that truth is brought to the notice of the Court and the reasons for my insistence that the girl should not visit her parental home. I have absolutely no objection if this Hon'ble Court should so deem fit to have the cross-examination of the plaintiff and her witnesses on this aspect of the case in camera."

The defendant only wanted an opportunity to have a detailed cross-examination on the matters referred to in paragraphs 9 to 13 of his written statement. The learned Judge in dealing with this application observed *inter alia* :—

"The petitioner states that he does not desire to sling mud on anybody. I am glad to have that assurance. So long as he does not sling mud, cross-examination will not be interfered with. But any attempt at mere mud throwing will be stopped."

This categorical assertion on the part of the learned Judge is very important. It is obvious that he had made up his mind to disallow any questions which he considered to be mere mud throwing. If, therefore, be allowed certain questions to be put by the petitioner as the counsel for the defendant, presumably the learned Judge was satisfied that they were not attempts at mere mud throwing. None of the questions which have led the learned Judge to make comments on the conduct of the petitioner was disallowed by him as being irrelevant or scandalous. It is also in evidence that questions relating to Dr. John's personal life were put by

1. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728.
2. (1898) 8 M.L.J. 304 : I.L.R. 22 Mad. 155 at 159.
3. (1957) S.C.J. 144 at 155.

the petitioner on the specific instructions of his client, the defendant. (*Vide* Exhibit R. 120.)

[Then their Lordships dealt with the several passages in the judgment and concluded :—]

We have no hesitation in holding that the adverse comments made by the learned Judge on the conduct of the petitioner are wholly unwarranted. He was only doing his duty by his client and it might be that part of his duty was neither pleasant nor savoury but it is difficult to exclude such things especially in the conduct of a matrimonial suit.

The question then arises whether the petitioner should be granted the relief which he expressly seeks, namely, that the passages complained against by him may be expunged from the Judgment of the learned Judge. The learned Attorney-General referred us to decisions of this Court and other Courts in support of his contention that this Court has got jurisdiction to expunge irrelevant and scandalous remarks made by a subordinate Court particularly when they are likely to cause damage to the reputation of the aggrieved person. In *Ramabhadra Naidu* v. *Subramania Iyer*[1], it was held by Sadasiva Aiyar and Moore, JJ., that the High Court may in appropriate cases have the power to expunge observations made in a judgment of a lower Court. Sadasiva Aiyar, J., observed at page 285 thus :—

"I do not wish to restrict the powers of this Court (which has general powers of superintendence under the Charter and it may be that where observations are found in the Judgment of a lower Court which are pointedly seditious, blasphemous or irrelevantly scandalous or indecent, they may be ordered to be expunged but such a power should be exercised only in extraordinary cases".

In *Public Prosecutor* In re[2], a similar view was taken by Leach, C.J., who took it as well established that in a proper case the High Court has power to expunge a part of a judgment of a Court subordinate to it. In an earlier case in *Panchanan Banerji* v. *Upendr nath Bhattacharji*[3], Sulaiman, J., as he then was discussed the question at some length and held that the High Court had inherent power to direct deletion of passages in the judgment of a subordinate Court which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. The basis of this conclusion, to quote his own words, was this :

" The High Court as the Supreme Court of revision must be deemed to have power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it."

Chagla, C.J., presiding over a Full Bench of the Bombay High Court in *State of Bombay* v. *Nilkanth*[4], took a more limited view of the power of the High Court in the matter of expunging of objectionable matter from the record of a subordinate Court. As in other decisions section 561-*A* of the Code of Criminal Procedure was referred to and construed in a sufficiently wide manner as to afford a lawyer or a stranger to the proceedings before a Magistrate an opportunity to approach the High Court seeking redress in a case where his reputation had been affected by unjust criticism by a Magistrate.

The learned Chief Justice however was clearly of the opinion that the High Court had no jurisdiction to expunge that is to say, to remove from the record any remarks in the judgment of a subordinate Court. But the learned Chief Justice was equally clearly of the opinion that it was open to the High Court in appropriate cases to *correct* the judgment of a lower Court.

No instance was cited at the Bar by the learned Attorney General in which a High Court invoked its inherent power to expunge from the judgment of a Judge of the High Court any remarks or observations. A judgment of a single Judge of this Court whether it be on the original side, or on the appellate side, in civil or criminal proceedings, is a judgment of the High Court. We do not think that a

1. (1916) 3 L.W. 283.
2. (1944) 1 M.L.J. 153 : I.L.R. (1944) Mad. 614.
3. (1926) I.L.R. 49 All. 255.
4. A.I.R. 1954 Bom. 65 (F.B.).

Division Bench or a fuller Bench of this Court has the power to delete passages from the judgment of this Court delivered by a single Judge. The High Court is a Court of record and that is another reason why we have no power to direct any expunging from the judgment of a learned Judge which is a part of the record of this Court. In our opinion further discussion is unnecessary because it is really academic. All that the petitioner seeks is a vindication of his conduct at the trial of the suit. His anxiety is only for his reputation as counsel. What we have said above, namely, that the adverse comments made by the learned Judge against him were not warranted should be sufficient to clear his reputation. In this view no orders are necessary on these petitions.

P.R.N. ——— *No orders necessary ; Adverse comments on Counsel held unwarranted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Messrs. Palaniappa Chettiar & Co., and others .. *Petitioners**

v.

The Deputy Commercial Tax Officer, Moore Market Division, Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939, *as amended by Amendment Act XVIII of* 1955), *sections* 3 *and* 5—*Madras General Sales Tax (Turnover and Assessment) Rules,* 1939, *(as amended in* 1955), *Rules* 15 *and* 16—*Scope—If invalid and* ultra vires, *as being "law imposing a tax"—Absence of sanction of President—Effect —Constitution of India* (1950), *Article* 286 (3)—*Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act (LII of* 1952), *section* 3—" *Law imposing or authorising the imposition of a tax*"—*Interpretation of—Rules framed under enactment—Machinery for assessment and collection of tax, if law imposing tax —Tests to determine.*

New Rules 15 and 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, which became law on their publication in the Gazette on 7th September, 1955, must be held to be subordinate legislation whose subject-matter is the prescription regarding assessment and collection of taxes " imposed " by sections 3 and 5 of the Madras General Sales Tax Act and, though without their existence, it would not be possible to levy or collect the tax, they are not in themselves "laws imposing the tax" within Article 286 (3) of the Constitution or section 3 of the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act of 1952. The rules in question are only machinery provisions, but the fact that without the machinery enactment (which are no doubt vital) the taxes may be incapable of being levied or collected would not make them "a law imposing the tax ". It is the essential nature of the provisions that has to be considered in deciding whether they are a law " imposing the tax ", their primary or subordinate place in the scheme of the enactment. Rules 15 and 16 cannot therefore be held illegal, inoperative or *ultra vires* on the ground that the sanction of the President has not been obtained as required by Article 286 (3) of the Constitution or section 3 of Act LII of 1952.

Subordinate legislation in the sense of a rule made under an enactment may be a " law " within Article 286 (3) and section 3 of Act LII of 1952. The absence of a specific reference to rules in Article 286 (3) does not lead to the conclusion that if a Sales Tax Act left the fixation of the rate of levy to a rule, the rule determining the rate would be a " law imposing the tax ", which is required to be reversed, for the President's sanction before it could be valid or operative under Article 286 (5)—such a rule would be a " law imposing the tax ", because the rate of tax is such an essential constituent part of tax legislation that it would be impossible to take them out of the category of a law imposing a tax.

It is not however, every law which has something to do with taxation that can be said to be a law which " imposes " a tax. A distinction had to be drawn between a provision in an enactment which defines the subject-matter of the tax and fixes the rate and one which provides for collection, recovery, exemption, refunds, penalties and other necessary incidents in any scheme of taxation.

Osborne v. *Commonwealth,* (1911) 12 C.L.R. 321 ; *Federal Commissioner of Taxation* v. *Munro,* (1926) 38 C.L.R. 153 ; *Cadbury Fry Fascall Proprietory Ltd.* v. *The Federal Commissioner of Taxation,* (1944) 70 C.L.R. 362, applied and followed.

Hajee Abdul Shukoor v. *State of Madras,* (1955) 2 M.L.J. 494 : 6 S.T.C. 352 (F.B.); *Noor Muhammad* v. *State of Madras,* (1956) 2 M.L.J. 374 : 7 S.T.C. 792, distinguished and explained.

Syed Muhammad v. *State of Madras,* (1952) 2 M.L.J. 598 : 3 S.T.C. 392 and *Syed Muhammad & Co.* v. *State of Andhra,* (1954) 1 M.L.J. 619 : 5 S.T.C. 108 (S.C.), referred to.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will

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* W.P. Nos. 1279, 1287, 1888, 1451, 1469 and 1456 of 1956. 25th November, 1957.

be pleased to issue a writ of *mandamus* directing the Deputy Commercial Tax Officer, Moore Market Division, Madras, to forbear from enforcing the provisions and Rules of the Madras General Sales Tax Act, 1938, as amended from time to time below mentioned, against the petitioners after declaring them *ultra vires*, namely sections 3 (1) (*a*) and 3 (3) of the Madras General Sales Tax Act and rule 5 of the Madras General Sales Tax Rules and rules 15 and 16 of the Turnover and Assessment Rules in so far as they make it obligatory on the part of every dealer in skins and hides to take out a license and submit returns and pay tax in advance.

M. K. Nambiyar, for *Messrs. Sundarajan* and *Sivaswami*, *T. T. Srinivasan* and *A. N. Rangaswami*, for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*K. Veeraswami*) for the Respondents.

The Order of the Court was delivered by

Rajagopala Ayyangar, J.—At the date relevant to these petitions Article 286 (3) of the Constitution ran :

" (3). No law made by the Legislature of a State imposing, or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

By virtue of the power thus vested in Parliament, was enacted the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1958 (LII of 1952). The Preamble to the Act stated that it was an Act to declare in pursuance of clause (3) of Article 286 of the Constitution, certain goods to be essential for the life of the community. The operative part of this enactment was section 3 which ran ;

" 3. No law made after the commencement of this Act by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any goods declared by this Act to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

The date of the commencement of the Act was 9th August, 1952, being the date on which having received the assent of the President it was published in the Gazette of India. Item 10 of the list of goods set out in the Schedule and which were declared "essential for the life of the community" to which the provisions of section 3 were attracted was "hides and skins".

Under the rule making power vested in them under section 3 and section 19 of the Madras General Sales Tax Act, 1939, the Government of Madras framed certain amendments to the Turnover and Assessment Rules amending the already existing ones relative to the imposition and levy of sales-tax on hides and skins. These changes were effected by a notification in the Official Gazette, dated 3rd September, 1955, the rules being expressed to have retrospective effect from the beginning of the financial year 1955-56. The question that is raised in these petitions is whether these rules infringe the provisions of Article 286 (3) of the Constitution or section 3 of Act LII of 1952.

Before entering on a discussion of this point, it would be convenient to put aside matters which are common ground and beyond controversy. The first is that Article 286 (3) addresses itself to the future and not to the past ; it imposes fetters on what might be termed post-Constitution laws and does not seek the invalidation of laws in existence on the date of the Constitution. The Sales Tax Acts of the several States which were "existing laws" on the date of the Constitution were thus left unaffected and operative without any restriction. Next, the constitutional prohibition did not operate of its own force but was dependent on parliamentary legislation declaring a commodity to be "essential to the life of the community" before the restriction came into operation. Lastly on the terms of section 3 of Act LII of 1952 the area of the State laws which were saved extended to those in force on 9th August, 1952, because only the State laws enacted after the coming into force of Act LII of 1952 were hit at by the restriction imposed by the Act.

The question which requires to be decided in these petitions is whether the amendment effected to rules 15 and 16 of the Turnover and Assessment Rules framed under the Madras General Sales Tax Act by the notification, dated 3rd September, 1955, to whose terms I shall immediately refer, was " a law made.... by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of hides and skins". The contentions urged by Mr. Nambiar for the petitioner and the learned Advocate-General for respondent-State were directed to assert or deny this proposition.

To appreciate the point urged by learned counsel for the petitioner it is necessary to advert to the scheme underlying the levy of sales tax on hides and skins before and after the impugned amendments. The statutory basis for the levy of a tax on the sale of goods, including that on hides and skins, was the Madras General Sales Tax Act, 1939. The charging provisions in this enactment imposing the levy was section 3 the material portion of which ran :

" 3. (1) Subject to the provisions of this Act :

(*a*) every dealer shall pay for each year a tax on his total turnover for such year ; and

(*b*) the tax shall be calculated at the rate of three pies for every rupee in such turnover.

* * * *

(4) For the purpose of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed :

Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed."

Sub-section (5) was followed by provisos which I omit as immaterial.

The expression "dealer" was defined in section 2 (*b*) to mean "any person who carries on the business of buying or selling goods." "Goods" were defined in section 2 (*c*) to mean

" all kinds of movable property other than actionable claims, stocks and shares and securities and includes all materials, commodities and articles."

This definition would therefore includes hides and skins and if section 3 (1) operated with out any other qualification every dealer in hides and skins would have been liable to pay tax in respect of his transactions, that is on his turnover, subject to such rules as might be prescribed. In other words, if section 3 (1) stood unqualified and had unrestricted operation there would be a multi-point levy of a tax on every dealer on his transactions in hides and skins. For reasons which it is unnecessary to explain, based mainly upon the importance of the encouragement of the export of hides and skins as being vital to national economy, the provision as to multi-point tax was modified in the case of these as well as certain other commodities by the provision in section 5. This section enacted ;

" 5. Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees. . . . .

(vi) the sale of hides and skins, whether tanned or untanned shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers as may be prescribed."

The net result was that the operation of the charge at multiple points on every dealer, levied by section 3 was modified in the case of hides and skins, by the imposition of the tax at a single point, the point at which however the tax was to be levied or the transaction which should determine the tax point being left to be prescribed by rules framed by the State-Government.

Rules 15 and 16 of the Turnover and Assessment Rules contained this "prescription" of the single point. These rules as they existed on 9th August, 1952 and whose validity therefore from the point of view arising for decision in the present case cannot be impugned ran :

" 15 (1). Rules 6 to 13 shall not apply to licensed tanners and other licensed dealers in hides or skins in respect of their dealings in hides or skins, but the provisions of this and the following rule shall apply to them in respect of such dealings.

* * * *

16. (1) In the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the State or are sold for export outside the State.

(i) In the case of all untanned hides or skins sold to a tanner in the State, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the State but are exported outside the State, the tax shall be levied from the dealer who was the last dealer not exempt from taxation under section 3 (3) who buys them in the State on the amount for which they were bought by him.

(3) Sales by licensed dealers of hides or skins which have been tanned within the State shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under section 3 (3) the sale of such hides or skins shall be liable to taxation as under the next sub-rule below dealing with hides or skins tanned outside the State.

(4) Sales by licensed dealers in hides or skins which have been tanned outside the State shall be exempt from taxation except at the stage of sale by the dealer who is the first dealer not exempt from taxation under section 3 (3) who sells them within the State. The tax shall be levied from such dealer on the amount for which he sells such hides or skins.

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall subject to the provisions of section 3, be liable to taxation on each occasion of sale."

The proper interpretation of these provisions particularly in relation to what might be included in the purchase turnover of a tanner-dealer and the liability of unlicensed dealers to tax came up before this Court and as a result of the decisions rendered, the position reduced itself to this. Rule 16 (5) was held to be beyond the rule making power of the State Government as being in contravention of section 5 (vi) (Vide *Syed Muhammad* v. *State of Madras*[1], confirmed by the Supreme Court in *Syed Muhammad & Company* v. *State of Andhra*[2]. The assessable turnover of a dealer in hides and skins was held not to include purchases from unlicensed dealers. *Hajee Abdul Shukoor & Co.* v. *State of Madras*[3]. The sales and purchases by unlicensed dealers were held not liable to tax under the Act for the reason that the transaction or the point specified as attracting tax liability under the prescription, was confined to sales or purchases by licensed dealers, *Noor Muhammad* v. *State of Madras*[4].

Under the rules as they stood prior to the recent amendments in 1955 it was not compulsory for dealers to be licensed, licensing being optional, the licensing provisions (rule 5 of the Madras General Sales Tax Rules) appearing to proceed on the basis that if a dealer desired to avail himself of the exemption from the multi-point tax, or the benefit of a single point tax he should get himself registered. This option, it may be mentioned, was generally availed of since the legal effects of the failure to exercise the option had not been adjudicated upon by the Courts before the decision in *Noor Muhammad's case*[4].

It was to avoid the state of affairs created by these decisions that amendments were effected to the rules. First rule 5 of the Madras General Sales Tax Rules was amended to make the taking out of a licence compulsory. This was followed by the impugned notification G.O. 2733, dated 3rd September, 1955, effecting amendments to rules 15 and 16. Rule 15 (1) was amended to read :

" 15 (1) Rules 6 to 13 shall not apply to dealers in hides and/or skins whether tanned or untanned in respect of their dealings in such hides and/or skins."

Rule 16 as amended read :

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1. (1952) 2 M.L.J. 598 : 3 S.T.C. 367.
2. (1954) 1 M.L.J. 619 : 5 S.T.C. 108 (S.C.).
3. (1955) 2 M.L.J. 494 : 6 S.T.C. 352 (F.B.).
4. (1956) 2 M.L.J. 374 : 7 S.T.C. 792.

" 16 (1). In the cases of untanned hides and/or skins the tax under section 3 (1) shall be levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3 (3) on the amount for which they are bought by him.

(2). (i) In the case of hides or skins which had been tanned outside the State, the tax under section 3 (1) shall be levied from the dealer who in the State si the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him.

(ii) In the case of tanned skins which have been tanned within the State, the tax under section 3 (1) shall be levied from a person who is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him :

Provided that, if he proves that the tax has already been levied under sub-rule (1) on the untanned hides and skins out of which the tanned hides and skins had been produced, he shall not be so liable.

(3) The burden of proving that a transaction is not liable to taxation under this rule shall be on the dealer."

The contention urged by Mr. Nambiar in these petitions was that the amended rules 15 and 16 were "a law imposing or authorising the imposition of a tax" on the sale or purchase of goods—hides and skins—declared by Parliament to be essential to the life of the community under Act LII of 1952. This thesis he sought to establish by the following line of reasoning. No doubt section 3(1) of the Madras General Sales Tax Act imposed a tax on the sale or purchase of any kind of goods but its imposition was subject to the restriction or limitation imposed by section 5 of the Act in relation to hides and skins. By reason of the latter provision section 3 was modified in the case of hides and skins by being taken out of the multi-point levy under section 3 (1). In cases therefore where sales-tax is levied at a single point the charge to tax under section 3 (1) does not operate unless and until the single point is determined. If section 5 itself determined that point the charge to tax levied or imposed by section 3 would have been brought into play at the date of enactment of section 5. That however was not the scheme which the Legislature pursued. The fixation of the single point, was, on the terms of section 5 (vi), left to be determined by rules and the relevant rules in that connection were rules 15 and 16 of the Turnover and Assessment Rules. The result was that until these rules were framed there was no imposition of sales-tax under the Act on hides and skins, the tax liability imposed by section 3 (1) becoming attracted to the transaction only by the rules and therefore the rules were framed. In this connection learned counsel for the petitioners invited my attention to certain passages in the judgment of this Court in *Abdul Shukoor* v. *State of Madras*[1], and *Noor Muhammad* v. *State of Madras*[2], where it was held that if a transaction was by a person or of the category not within rules 15 and 16, there was no liability to tax. Basing himself on these, the learned counsel submitted that it was rules 15 and 16 as they existed prior to 9th August, 1952, which had imposed tax on transactions in hides and skins, that since the rules under which the taxes now are sought to be levied were those framed in September, 1955, replacing the earlier rules, these news rules constituted "the law imposing the tax" within the meaning of section 3 of Act LII of 1952 and that as these rules were not reserved for the consideration of the President, they would be inoperative by reason of Article 286 (3) of the Constitution read with section 3 of Central Act LII of 1952.

I must say that the submission above summarised raises difficult problems and merits serious consideration.

Before detailing or discussing the arguments of the learned Advocate-General, there is one matter I would like to refer to immediately. It was not disputed that subordinate legislation in the sense of a rule made under an enactment was a "law" within the opening words of Article 286 (3) of the Constitution and section 3 of Act LII of 1952. The learned Advocate-General however submitted that the words "imposing or authorising the imposition of" connoted two district concepts. A

1. (1955) 2 M.L.J. 494 : 6 S.T.C. 352. 2. (1956) 2 M.L.J. 374 : 7 S.T.C. 792.

law " imposed a tax " where it directly did so, that is *pro prio vigore.* The expression " authorising the imposition of a tax " he said would apply to cases where the Legislature vested another body with a power to make a law imposing the tax. He instanced the cases of taxes imposed by Municipal authorities under the provisions of the Municipal or Local Government Acts. In such cases the Legislature of the State which had power under the relevant entries of the State Legislative List to impose a tax authorised Municipal authorities to levy certain designated taxes within their respective areas. There is no doubt that the Advocate-General was right so far that the taxation permitted to Municipalities and other local authorities by State legislation could be aptly described as " laws authorising the imposition of a tax." But this in my opinion does not exhaust the entire category of "laws authorising the imposition of a tax ". For instance customs duties imposed by notification of the Central Government under sections 3 (*a*), 4 and 4 (*a*) of the Indian Tariff Act (XXXII of 1934) would fall within the category of" impositions authorised by law ". Taxes levied by virtue of power conferred by lawful delegation would be comprehended within the meaning of these words. Broadly speaking the distinction between the two categories would correspond to that between " by " and " under " a law.

The learned Advocate-General invited my attention to the provisions of Articles 287, 288 and 289 in which the expression " law imposing or authorising the imposition of, a tax " occurs and in particular to the provision in Article 288 (2) under which even rules are required to obtain the previous sanction of the President if these rules touch upon " the fixation of the rates and other incidents of such tax " on the terms specified in clause (1) and contrasted them with the terms of Article 286 (3). This however does not lead to the conclusion that the absence of a specific reference to rules in Article 286 (3) favours an interpretation that if a Sales-tax Act left the fixation of the rate of levy to a rule, the rule determining the rate would not be "a law imposing the tax" which was required to be reserved for the President's sanction before it could be valid or operative under Article 286 (3). Indeed the learned Advocate-General expressly disclaimed any such inference being drawn from this contrast in the contents of the Articles. Though the point is not covered by authority, I entertain no doubt that such a rule would be " a law imposing the tax " because the rate of tax is such an essential constitutent part of tax legislation (*see* for instance the Annual Finance Acts) that it would be impossible to take them out of the category of " a law imposing a tax ".

This brings me to a consideration of the crucial point in this case namely whether the new rules 15 and 16 of the Turnover and Assessment Rules which became law on their publication in the Gazette on 3rd September, 1955, was " a law" imposing a tax on the purchase and sale of goods within section 3 of Act LII of 1952. I shall now briefly state the opposing contentions. On behalf of the petitioners it was urged that it was by virtue of rules 15 and 16 that any transaction of purchase or sale of hides and skins was brought within the sphere of the charging provision of the Madras General Sales Tax Act and the new rules not having received the President's sanction, cannot have legal operation. If this contention were upheld it would mean that no sales tax could lawfully be levied on transactions in hides and skins from and after 1st April, 1955, because the earlier rules which did not offend Article 286 (3) were repealed and the new rules could not operate. On the other hand, the contention on behalf of the State was that " the law imposing sales tax " on transactions in hides and skins was the Madras General Sales Tax Act, 1939, a law which does not offend the provisions of Act LII of 1952 and that the rules made under it including rules 15 and 16 were merely machinery provisions and not " laws imposing a tax ". In this connection the learned Advocate-General submitted that in regard to a tax of the nature of a sales-tax the essential constituent elements would be these : (1) the provision which determined the goods upon which the tax was leviable and (2) that which prescribed the rate of duty ; (3) the nature of the tax, *i.e.*, whether it was multi-point or at a single point. In the case of a personal tax as distinguished from taxes on transactions like sales-tax, the persons

who would be liable to tax would have been an essential constituent element of the law imposing the tax. But in the case of taxes like sales-tax the emphasis is shifted from the persons liable, to the commodities liable to tax, the latter becoming crucial as an essential constituent of " the law imposing a tax ". These three elements were, he submitted, present in the present Act of 1939 a pre-1952 law and so the other provisions both of that enactment and of the subsidiary legislation thereunder should be viewed merely as machinery provisions which however important they might be could not by themselves be properly designated as " laws imposing the tax ".

Before considering the correctness of these two opposing views, I might pause to mention that during the course of the arguments a third possible position suggested itself to me. This was that even assuming that learned counsel for the petitioners was right in his submission that the new rules 15 and 16 were " laws imposing taxes " they would be invalid only to the extent to which the persons and transactions not previously liable to tax were brought within the area of taxation after the coming into force of Act LII of 1952. On further consideration, however, I have reached the conclusion that this intermediate position could not be fitted into the language of Article 286 (3) of the Constitution or section 3 of Act LII of 1952. The intermediate view that "a law imposing a tax" which replaces an earlier one of the same nature, contravenes section 3 of Act LII of 1952 only to the extent to which it oversteps the previous law, assumes that the later enactment is "a law imposing a tax ". If, however, the later provisions were "a law imposing a tax" no portion of it can be saved from the prohibition enacted by Article 286 (3) or section 3, without reading into the latter a saving in regard to taxes previously imposed, which is not to be found there. Where the impugned law expressly repeals an earlier enactment and re-enacts the taxation-provision in a modified form, either extending its scope, altering its incidence or even restricting its area, the source of power to the taxing authorities to levy and assess the tax would be the later enactment and not the earlier one and therefore in that sense it would be the later law that would impose the tax. The theory which I just now mentioned could be sustained only by denying the fact of a repeal which is in terms expressed. For these reasons I consider this intermediate theory as illogical and unsound.

This leaves for consideration the two opposite views put forward by learned counsel for the petitioners and for the State—either rules 15 and 16 of the Turnover and Assessment Rules is " a law imposing a tax " in which case there could be no tax levied on hides and skins or they are not a law imposing a tax in which case the entire provisions would be valid. The choice between them can be made only by ascertaining the precise connotation and import of the words " law imposing or authorising the imposition of a tax" in Article 286 (3) which are repeated in section 3 of Act LII of 1952.

What then is the import of the expression " law imposing a tax " or put in another way what is a law which imposes a tax or when can a law be said to "impose" tax ?. One thing is clear. It is not every law which has something to do with taxation that can be said to be a law which " imposes ". Take for instance the Revenue Recovery Act, which provides for the collection of taxes and other impositions. Though it touches and concerns taxes, it cannot be said to be " a law imposing a tax " for it assumes that a tax has been laid and merely provides the machinery for its collection. The illustration I have taken is so clearly outside the field of a " law imposing a tax " that there may be no controversy regarding its classification but that cannot exhaust the category of laws dealing with taxation which are not themselves " laws imposing taxes."

In this context I feel I could derive considerable assistance from the decisions and dicta of the learned Judges of the High Court of Australia explaining the meaning of the words "laws imposing taxation" in sections 53 and 55 of the Commonwealth of Australia Act, 1900. Section 51 (*ii*) of the Act vests in the Commonwealth Parliament the power to make "laws respecting taxation". This, however, is subject to the restriction to be found in sections 53 and 55 of the Act the portions material to our purpose reading:

"53. Proposed laws. . . . . . imposing taxation, shall not originate in the Senate. The Senate may not amend proposed laws imposing taxation."

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

In order to conform to the requirements of these two provisions the Parliament of the Commonwealth uniformly and invariably followed the practice of passing separately Tax Acts which "imposed" any particular tax and Assessment Acts which provided machinery for the assessment and collection of the tax imposed or to be imposed by the other. This was to enable the Senate to amend Assessment Acts which they could not do in the case of the Tax Acts. Acts of the former type provided means for the assessment and collection of the tax. They authorised officers to compute and collect the tax laying duties upon persons to make returns in order to make such assessment and collection possible. The Tax Acts contained "*the grant*" of money—they imposed the burden upon the people. According to the High Court of Australia it is the latter Acts and not the former which were to be regarded "as imposing taxation" and therefore as not capable of originating in the Senate or of being amended by the Senate. It has been held on several occasions that the various Assessment Acts did not "impose taxation" and so held notwithstanding that such Acts contained provisions which brought into charge persons or transactions not normally within the scope of the Tax Act, for the reason that the Assessment Act was ancillary to the Tax Act.

In *Osborne* v. *Commonwealth*[1], the question for the decision of the Court related to whether the Land Tax Assessment Act, 1910, was or was not "an Act imposing taxation" within the meaning of section 55 of the Constitution. Counsel seeking an affirmative answer pointed to sections 10 and 12 and certain other sections. Section 10 of the Act provided that land tax imposed by the relevant Tax Act should be levied and paid upon the unimproved value of the land but it also contained a provision that the rate of tax should be as declared by Parliament. Section 12 provided that land tax should be charged on land as owned at a particular time. There were other sections which stated that persons should be liable for land tax in certain specified cases and counsel relied on these also in support of the violation of section 55. Griffith, C.J., Barton, O'Connor and Isaacs, JJ., held that the Assessment Act did not impose taxation notwithstanding the presence of these provisions. The reasoning on which this conclusion was rested was that the Tax Act fixed the rate and specified land as the subject of taxation and the Assessment Act which in part determined the value which was subjected to tax was ancillary to the Tax Act and constituted merely machinery for the assessment and collection of the tax.

Federal Commissioner of Taxation v. *Munro*[2], was concerned with the validity of the Income-tax Assessment Act, 1922-24. Section 28 of that enactment created a special measure of taxable income to meet the special requirements of a case which offered facilities for evasion and which were not properly met by the ordinary measure of taxable income applied in the Australian Income-tax Act. The Court held that this provision in the Assessment Act did not impose taxation, Isaacs, J., saying :

"The words 'imposition' and 'imposing' mean the same thing and both mean 'grant' and both are distinct from the management, assessment, collection and control of the tax."

Cadbury-Fry-Fascall Proprietary Limited v. *The Federal Commissioner of Taxation*[3], raised *inter alia* the validity of the Income-tax Assessment Act 1936-39 and in particular whether sections 104 and 105 offended section 55 of the Constitution as a law imposing a tax. These sections made provision for the passing of orders corresponding to those under section 23-A of the Indian Income-tax Act under which an assessing authority might treat the undistributed profits of a company on the same basis as if dividends were declared, the relative shareholders treated as being in receipt of such notional dividends. This "deemed income" of the shareholders was sought to be assessed under the relevant Income-tax Acts. The Full Court

1. (1911) 12 C.L.R. 321.
2. (1926) 38 C.L.R. 153.
3. (1944) 70 C.L.R. 362.

unanimously held that sections 104 and 105 of the Income-tax Assessment Act were not " laws imposing taxation " within section 55 of the Constitution. If the Tax Act imposed a tax on income the determination of what constituted ' income ' in certain special circumstances which should be brought within the charge was held not to be part of " law which imposed the tax."

These decisions and the reasoning contained in them led me to the conclusion that the expression " laws imposing taxation " occurring in our Constitution should receive a limited construction.

A law *dealing* with taxation is therefore not necessarily a " law imposing taxation ". To apply these decisions to the situation on hand, the position appears to me to be this. The Madras General Sales Tax Act is a " law imposing the tax ". Under it the person who is liable to tax is the " dealer ". The subject-matter of the tax is a transaction of sale or purchase of any commodity and the tax is laid on the total turnover of such dealer. The rate of tax is that laid down in the levy provision, section 3 (1) and (2). The nature of the levy whether it is multiple point or at a single point is determined by the operation of section 5. The rest of the Act contains merely machinery provisions for the assessment and collection of tax. How the turnover is to be computed, which items of transactions shall be included or excluded in such computation, who shall compute it in the first instance and determine the tax payable, to whom appeals shall be preferred from such determination or decision, when the tax has to be paid as well as the machinery for collection including penalties for non-payment are machinery provisions for the assessment and collection of the tax imposed. The sections of the Act or the rules dealing with these matters would undoubtedly be laws " *dealing* " with sales tax but they would not be " laws imposing the tax ". There can be no doubt that these machinery or assessment provisions are vital and without these " laws dealing with the sales tax " the tax cannot be effectively laid or enforced and though in that sense they would be part of taxation measure, they would not, in my opinion, be " laws imposing taxes " to fall within Article 286 (3). If any other construction were adopted it would mean that every little change in the rule which might after all be machinery for collection, would have to obtain the sanction of the President, a situation which would lead to serious inconvenience, an inconvenience which could not have been intended by the framers of the Constitution.

I have next to consider whether the provision in section 5 (*vi*) and the place which rules 15 and 16 occupy in the scheme of the sales tax on hides and skins render these rules " laws imposing taxes ". I fully recognise that taxation might be imposed absolutely as well as conditionally and that while one law may select the subject of taxation it might leave it to other laws to prescribe conditions on the fulfilment of which alone the tax liability shall fasten. In such cases no doubt the fulfilment of the condition would be a constituent fact in the emergence of tax liability and therefore an essential element in the imposition of the tax. A law which prescribes the conditions on which the tax liability should arise can properly be described as part of the law imposing the tax. I am, however, unable to attribute this effect to the rules with which these petitions are concerned. No doubt there are passages in the judgment of this Court in *Abdul Shukoor* v. *The State of Madras*[1], as well as in *Noor Muhammad* v. *The State of Madras*[2], where stress is laid on the operation of rule 16 as bringing into existence the liability to tax. But the Court was there dealing with problems of quite a different nature from those which arise here. To illustrate my point I would take the case of rules framed under section 3 (4) for the computation of the turnover. It cannot be disputed that without the rules prescribing the method for computing the turnover, the charging provision in section 3 (1) could not be brought into play. It cannot on this account be contended that the rules made under section 3 (4) for computing the turnover is a law imposing the tax. Take again the case of rules framed under section 3 (5) which enacts :

" 3 (5) The taxes under sub-sections (1), (1-A) and (2) shall be assessed. levied and collected in such manner and in such instalments, if any, as may be prescribed,

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1. (1942) 2 M.L.J. 494 : 6 S.T.C. 352 (F.B.). 2. (1956) 2 M.L.J. 374 : 7 S.T.C. 792.

Provided that:—

(i) in respect of the same transaction of sale, the buyer or the seller, but not both, as determined by such rules as may be prescribed shall be taxed ;

(ii) where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in clause (*i*) of this proviso he shall not be taxed again in respect of any sale of such goods effected by him."

The rules framed under the first paragraph of the sub-section are undoubtedly merely machinery provisions and not laws imposing a tax in the sense I have described above. The first proviso enacts that the rules should lay down whether the seller or the buyer in respect of each transaction of sale should be liable to tax on his total turnover. The prescription in this regard cannot be disassociated and be held a law imposing a tax as distinguished from a law " dealing " with the taxing provisions merely because it was that prescription which brought the dealer within or without the scope of the levy. It is the essential nature of the provision that has to be considered, its primary or subordinate place in the scheme of the enactment. Take the instant case of the rules determining the single point at which the tax shall be levied on transactions in hides and skins. The provision in relation to the levy of the tax—the law imposing the tax—is section 3 (1) and (2) as modified by provisions of section 5 (*vi*); it is these that constitute "the law imposing the tax." They determine (1) that in the case of hides and skins there shall be tax at a single point as well as the rate at which such tax shall be levied. What that single point would be is no doubt left to the rules but the rules which select the single point, perform no other function than carrying out the provisions of the enactment, which impose the tax. The fact that without the prescription by the rule, the tax would not be exigible does not decide the question as to whether the rules are or are not " laws imposing taxes " within the meaning of Article 286 (3). As I have already pointed out the fact that, in the absence of any rule, which, though in its essentials, is a machinery provision, it is not possible to levy the tax or collect it, does not thereby render the rule " a law imposing the tax " within the meaning of Article 286 (3). In my opinion, the test formulated by learned counsel for the petitioners that if in the absence of a particular rule, taxes could not be levied or collected, the rule in question would be "a law imposing a tax" is too wide and an overstatement because admitted machinery provisions would then be comprehended within such a law. Different aspects of what might broadly be termed the subject of taxation may be found in separate enactments but a distinction must be drawn, which defines the subject-matter of the tax and fixes the rate and others which provide for the collection, recovery, exemption, refunds, penalties and other necessary incidents in any scheme of taxation. Without the machinery enactment the taxes may be incapable of being laid or collected but that does not make it a "law imposing the tax". In my opinion the impugned rules 15 and 16 of the Turnover and Assessment Rules were subordinate legislation whose subject-matter was the prescription regarding assessment and collection of taxes " imposed " by sections 3 and 5 of the Sales Tax Act and though without their existence, it could not have been possible to levy or collect the tax, they are not in themselves " laws imposing the tax " within Article 286 (3) or section 3 of Act LII of 1952.

Before closing I must add that the question to be decided was a very difficult one, really of first impression being uncovered by authority and I must not fail to acknowledge the assistance I have derived from the arguments of learned counsel on either side.

The other point raised in the petitions regarding the validity of the retrospective operation of the G.O., dated 3rd September, 1955 from 1st April, 1955, was not argued by counsel, as this has been decided adverse to the petitioner in W.P. Nos. 625 and 626 of 1956.[1] The petitions fail and are dismissed. The rules *nisi* are discharged, but there wil be no order as to costs.

R.M. *Petitions dismissed.*

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1. Since reported as *Guruviah Naidu* v. *State of Madras* (1958) 1 M.L.J. 132.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Ahamed Rowther .. *Appellant**

v.

Bathumal Beevi and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rules* 23 *and* 25—*Remand by Appellate Court—Scope of.*

Rules 23 and 25 of Order 41 of the Code of Civil Procedure does not enable an Appellate Court to remand a suit for retrial merely on the ground that reception of additional evidence is necessary. Rule 23 refers to cases of remand where a decree is reversed on appeal and such decrees were based on a preliminary point. Rule 25 provides for an Appellate Court directing the trial Court to take additional evidence required and to return the evidence to the Appellate Court together with its findings, if necessary.

Appeal against the Order of the Court of the Subordinate Judge of Sivaganga, dated 21st June, 1956 and made in A.S. No. 69 of 1955 (O.S. No. 53 of 1954, District Munsif's Court, Manamadurai.)

K. V. Srinivasa Ayyar, for Appellant.

A. Sundaram Ayyar and *P. Balasubramaniam,* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is against an order of remand passed by the Subordinate Judge of Sivaganga in A.S. No. 69 of 1955. The defendants were the appellants before the Subordinate Judge. They had appealed against a decree of the District Munsif who decreed redemption of an othi deed, dated 5th January, 1939, by one Sulaika Beevi to the first defendant. A gift by Sulaika Beevi was relied on by the defendant, as also a release by a son of Sulaika Beevi. Both these documents were produced before the District Munsif. But, as they were unstamped, the District Munsif insisted upon payment of stamp duty and penalty. Obviously, the appellants were not able to pay it within the time allowed by the District Munsif, and further time asked for was refused. But the District Munsif rendered a judgment on the merits after discussing the evidence. The appellants, after filing the appeal, filed I.A. No. 89 of 1956 under Order 41, rule 27, for receiving additional evidence in appeal. The additional evidence tendered was the two documents in question, as also some kist receipts. The learned Subordinate Judge thought that these documents were material. At once, he came to the conclusion that the whole appeal should be remanded and there should be a fresh hearing. He obviously forgot that his powers of remand under Order 41, rules 23 and 25, do not permit him to send the suit back for retrial merely on the groind that reception of additional evidence is necessary. Order 41, rule 25, specifically provides for an Appellate Court directing the trial Court to take additional evidence required and to return the evidence to the Appellate Court together with its findings if any findings are necessary. Rule 23 of Order 41 refers to a case of remand where a decree is reversed in appeal and such decree was based upon a preliminary point. This is not such a case. The learned Subordinate Judge was therefore not justified in passing an order of remand even if he was satisfied that additional evidence was necessary.

This appeal is allowed. The order of remand is set aside and the appeal will be restored to the file of the Subordinate Judge and will be heard by the present Subordinate Judge. It should not be taken that I have expressed any opinion on the merits of the application for receiving additional evidence. It will be open to the new Judge to form his own conclusion upon the merits of that application after hearing the parties. There will be no order as to costs.

R.M. ——— *Appeal allowed.*

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* A.A.O. No. 356 of 1956. 3rd July, 1959.
(12th Asadha, 1881—Saka).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

R.K.A. Ponnuraman .. *Petitioner**

v.

Rajappa Malavarayar .. *Respondent.*

Madras Village Panchayats Act (X of 1950), *section* 19 (1)—*Order of the District Munsif declaring the election of a member invalid—No revision lies under section* 115, *Code of Civil Procedure (V of* 1908) *as the authority acts as* persona designata.

The District Munsif having been named and designated as a judicial authority to inquire into the petitions questioning the validity of an election under section 19 (1) of the Madras Village Panchayats Act, is not a Civil Court which could be said to be subordinate to the Jurisdiction of the High Court so as to be brought within the purview of section 115 of the Civil Procedure Code.

A Civil Revision Petition under section 115 of the Civil Procedure Code against the order of the District Munsif declaring the election of a person invalid on the ground of his having an interest in a contract made with the Panchayat Board at the relevant dates is therefore, not competent.

It may be that a tribunal, any election commissioner or any other judicial authority acting as *persona designata* may be subject to the revisional jurisdiction of the High Court when there is want of jurisdiction in the Tribunal or other authority.

Lakshmana Chetty v. *Kannappar*, (1926) 51 M.L.J. 738 : I.L.R. 50 Mad. 121 (F.B.) followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tiruvaiyaru, dated 9th February, 1958 and made in O.P. No. 25 of 1958.

R. Gopalaswami Ayyangar, for Petitioner.

G. R. Jagadisa Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order of the learned District Munsif of Tiruvaiyaru in O.P. No 25 of 1958 filed under section 115, Civil Procedure Code. The facts are briefly these. The respondent in this Civil Revision Petition filed an application under section 19 (1) of the Madras Village Panchayats Act, Act X of 1950, questioning the validity of the election of the respondent in the lower Court as a member of the Panchayat Board. The contention of the respondent before the Lower Court was that on the date of the nomination, namely 6th May, 1958, as well as on the date of election, namely 7th May, 1958, the Petitioner in this Civil Revision Petition was interested in a subsisting contract made by the Panchayat Board, Budalore in 1955 for constructing an overhead tank in the Panchayat area. The petitioner was the President of the Panchayat Board during the lease period and entered into a contract with the Board in his own personal capacity to construct a water tank and not in the capacity of President. The work assigned to the said Petitioner was still incomplete and he had received only part of the amount due to him. It was also alleged that the work was done for the benefit of the Panchayat Board, Budalore, that the contract was still subsisting even after the date of Act X of 1950. The further allegation in the Petition was that the Petitioner had undertaken to construct a building for the Panchayat prior to entering into a contract with the Board and that work was also still pending. Therefore, it was argued by the Petitioner before the learned District Munsif that the Petitioner had become disqualified to be a member of the Panchayat, as he was interested in a subsisting contract made with the Panchayat. The Respondent, therefore, had prayed for a declaration that the Petitioner was disqualified to be a member and consequently to be a President of the Panchayat Board.

The Petitioner in this Civil Revision Petition on the other hand contended that he was in no way disqualified to be elected a member on the date of nomination or on the date of election. He was not interested in any contract, much less a subsisting

*C.R.P. No. 319 of 1959. 13th April, 1959.

contract with the Panchayat Board, Budalore for construction of any work for the panchayat. There was no contract entered into by him with the Board as alleged before the learned District Munsif. The Government of Madras, according to the Petitioner, had undertaken the work of constructing an overhead tank in the village of Budalore and had sanctioned the sum of Rs. 33,600 under the Local Development scheme. That work was not entrusted to the Budalore Panchayat. On the other hand it was entrusted to the Petitioner, who entered into a contract with the Government of Madras for the constuction of the overhead tank. It was the Government that had given him the work and the Panchayat had nothing to do with the contract and so it could not be a contract with the panchayat, which alone would disqualify a person with either being nominated or elected as a President. He also contended that the work was not one, which was being done for the benefit of the panchayat, though no doubt the work was done for the benefit of the inhabitants of the village of Budalore and the adjoining villages. The Petitioner further contended that the work could not be deemed to be a work for the Panchayat. So, the point urged by the Petitioner was that the work was being done for the Government under a contract with the Government and should not bring him within the provisions of Madras Act X of 1950. He also contended that his executing the contract was not in conflict with his capacity as a President or as a member of the Panchayat. Until the time the Government handed over the completed work to the Panchayat, the Panchayat had no interest or concern over the work. He also pleaded that the Petition was the result of ill-feelings between himself and the Respondent by reason of the fact that the Respondent failed to get himself elected as President.

The learned District Munsif framed the points for determination in the following terms :

"(1) Is the Respondent disqualified to be a member and President ?

(2) To what relief is the Petitioner entitled ?"

After considering the oral and documentary evidence in the case, the learned District Munsif came to the conclusion that the Petitioner in the lower Court, the Respondent before me, had made out a case against the present Petitioner in the Civil Revision Petition. He observed that the work was done for the Panchayat and that it was certainly a work for the Panchayat, though the work was done on a contract between the Government and the respondent that is the Petitioner. The Panchayat in his opinion, the learned District Munsif observed, could not be dissociated with the work, because it was at the instance of the Panchayat that the work was mooted out. Several resolutions had been passed by the Panchayat in that connection to show that the Panchayat was interested in the work. They had also contributed certain sums of money for the work. He also relied upon Exhibit A-9, which disclosed that the Panchayat had authorised the President, Respondent to do the work in his individual capacity. So, he could not accept the Respondent's case that the work, was not done for the Panchayat. On these facts the learned District Munsif proceeded to find that the Petitioner in this Civil Revision Petition was interested in the work, which was proved by the admitted fact that the work was still incomplete and was pending and was being done by the Respondent-Petitioner and that admittedly the Petitioner had received a part payment of the amount due in respect of the contract, that the Petitioner was no other than the President of the Panchayat Board and he was certainly interested in the work, because he got money from the Government under the contract, Exhibit A-1 in the case. The learned District Munsif felt convinced that the Petitioner was interested in a work done for the Panchayat and therefore he declared that the Petitioner was not qualified to be a member of the Panchayat or to be elected as President.

Against this order of the learned District Munsif the Respondent in the original Petition has preferred this Civil Revision Petition.

When the Civil Revision Petition was taken up for arguments, Mr. Jagadisa Ayyar appearing on behalf of the Respondent-Petitioner in the original Petition raised a preliminary point to the effect that this Civil Revision Petition was not com-

petent on the ground that the Judicial authority appointed to enquire into such Petitions was not a Court but was only an Officer acting as a *persona designata* and therefore this Civil Revision Petition was not maintainable against his order. Under the Madras Village Panchayats Act (X of 1950), section 19 (1) the authority to decide question of disqualifications of members is described to be the prescribed judicial authority whose decision shall be final. While prescribing this judicial authority under section 19 (1) of the Madras Village Panchayats Act, the Government of Madras issued Notification No. 6. The date of this notification is not clear. Anyhow, the rule issued is to the following effect.

"*Judicial Authority to decide question relating to disqualification of members.*—The judicial authority to whom applications under section 19 (1) of the Act may be made shall be the District Munsif having territorial jurisdiction over the place in which the office of the panchayat concerned is situated or if there is more than one such District Munsif, the Principal District Munsif."

The second part of the rule provides as follows:

"Provided that the District Judge shall have power to transfer any such application to any other District Munsif in the District."

On the basis of this Rule, Mr. Jagadisa Ayyar contends that the judicial authority is only the District Munsif and not the District Munsif's Court. In so far as the District Munsif's Court has not been made the judicial authority, but only the District Munsif as such, that is to say, the Munsif who is presiding over the Court having territorial jurisdiction over the place in which the office of the Panchayat concerned is situate, it cannot be claimed that the Munsif's Court is meant by the rule prescribing the judicial authority to enquire into questions of disqualifications under section 19 (1) and not the District Munsif as such. The learned counsel further points out that it is only the District Munsif as such and not the Court that was intended to act in matters arising under section 19 (1) of the Madras Village Panchayats Act is made clear by the further fact that in the latter part of the first paragraph of the Rule it is mentioned that if there is more than one such District Munsif, it should be the Principal District Munsif, who should deal with such enquiries. If it were the intention of the rule-making authority that it should be the Munsif's Court only, then this clarification was not called for, is the argument advanced by the learned counsel for the Respondents; because in the case of more than one Court in the same territorial jurisdiction the question of different jurisdictions does not arise and therefore it was sought to be made clear that it was the Principal District Munsif that should hold the enquiry under section 19 (1) of the Madras Village Panchayats Act and not the Court itself.

A further point was also urged by the learned counsel for the Respondent that the proviso also makes it clear that it was intended that the prescribed judicial authority should act only as a *persona designata* and not as a Court; for in the proviso the District Judge as such is given power to transfer any such application made under section 19 (1) of the Act to any other District Munsif in the district. The contention is that if it was a Court that was intended to deal with applications, then it was quite unnecessary and uncalled for that a special provision should be made to the effect that a District Judge should have the power to transfer any such application to any other District Munsif in the district. For if it was only the Court that was to deal with such applications, the District Munsif's Court would be subordinate to the District Judge's Court and if it was the Court that was intended in both the cases, then a special provision of the type made under this Rule was quite redundant and unnecessary when the District Court will have the power under the Civil Procedure Code to transfer any proceedings before a District Munsif's Court without any such special power being vested in the District Court or the District Judge as such. He urged that this was a clear indication that what was intended to be done by the rule was merely to appoint a person or an officer to act in his capacity as a *persona designata* and not the Court, presided over by him that was to function in relation to such applications. The learned counsel for the Respondent, therefore, argued that in so far as the learned District Munsif was acting in his capacity as a *persona designata*, he could not be said to be a Court subordinate to the High Court and powers of the High Court under section 115, Civil Procedure Code, could not be invoked.

The further point raised by Mr. Jagadisa Ayyar was that section 19 (1) provided also that the decision of the prescribed judicial authority shall be final. That also indicated that it was the intention of the Rule making authority and the Legislature also that the decision of the District Munsif should not be liable to any appeal and that there should be some finality with regard to the decision made by the District Munsif. If it were the intention that the term "District Munsif" was to be understood as "District Munsif's Court", then the provision in section 19 (1) of the Act that the judicial authority's decision shall be final will be in violation of the rights of a party to take matters on appeal, or revision, to a superior Court when he is aggrieved by decisions of subordinate Courts.

As against these contentions Mr. Gopalaswami Ayyangar, the learned counsel for the petitioner has invited my attention to the Rules made by the Government under the same Madras Village Panchayats Act, (X of 1950) for decision of election disputes. Those Rules provide that all election petitions shall be presented in accordance with the Rules to an Election Commissioner as defined in rule (2) of the said Rules and they also provide for the procedure to be followed in the presentation of such petitions to the Election Commisioner. Those Rules are framed under the powers given by the Act under section 114 (1) of the Madras Village Panchayats Act, (X of 1950). Defining the Election Commissioner in the said rule (2), it is stated.

"Where the Government so direct, whether in respect of Panchayats generally or in respect of any class of Panchayats or in respect of panchayats in the same district or taluk, such Officers or Officer of Government as may be designated by the Government in this behalf by name or by virtue of Office:

Provided that an election petition may, on application, be transferred,

(*a*) if presented to a District Munsif under clause (*i*) by the District Judge concerned to another District Munsif within the jurisdiction ;

(*b*) if presented to an Officer of Government under clause (*ii*), by the Government to another Officer of Government.

Where an Election Petition is transferred to any authority under the foregoing proviso, such authority shall be deemed to be the Election Commissioner."

Then follows rule (3), on which emphasis has been laid by the learned counsel for the petitioner. It is in the following terms :

"An Election Commissioner exercising jurisdiction under these Rules shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a Judge or other Officer of Government as the case may be".

The learned counsel for the petitioner contends on the basis of this Rule that if really it was the intention of the Government, the Rule making authority, that the District Munsif holding enquiries under section 19 (1) of the Act were to act as a *persona designata*, a similar provision would have been made in that Rule to the same effect as contained in rule (3). The absence of a similar provision in the Rules framed for enquiries into matters covered by section 19 (1) would point to the fact that, though the term District Munsif and District Judge was used in these Rules, it was only intended that the District Munsif's Court and District Judge's Court should function and that it was not intended that these Presiding Officers should act as *persona designata*. The Rules framed for the decision of election disputes was a pointer to the fact that the Rule making authority could not have intended the District Munsif to be anything other than the District Munsif's Court over which he presided. It was also pointed out by the learned counsel for the petitioner that the further term used in the Rules, namely, the District Munsif having jurisdiction over the territory in which the panchayat was situated would be meaningless, unless it were interpreted as though it was the Court that was meant and not the Officer presiding over the Court. The Officer presiding over the Court generally has no territorial jurisdiction but only the Court has jurisdiction and therefore it should be inferred that what was intended by the rule for enquiries under section 19 (1) was only that the District Munsif should function as a Court and not that the District Munsif should function as a *persona designata*.

The learned counsel on both sides have invited my attention to several decisions in support of their respective contentions. Mr. Jagadisa Ayyar cited before me a decision in *Lakshmanan Chetty* v. *Kannappar*[1], by a Full Bench of this Court where it was held that the Chief Justice of the Small Causes Court appointed to make enquiries into election petitions or questions of validity of nomination, etc., was only functioning as a *persona designata* and not as a Court. He pointed out that this Full Bench decision distinguished the earlier Full Bench decision cited in *Parthasarathi Naidu* v. *Koteswara Rao*[2], which held the contrary view, namely, that when it was named as a District Judge or a Subordinate Judge, the District Judge or Subordinate Judge was not acting merely as a *persona designata* but also was acting as a Court. A further decision reported in *Abdul Wahib Sahib* v. *Abdul Khader Sahib*[3], was also cited by Mr. Jagadisa Ayyar wherein Yahya Ali, J., held that any Officer designated by name, though he might hold the position of a judicial authority was still acting only as a *persona designata* and not as a Court, following the decision of the Full Bench in *Lakshmanan Chetty* v. *Kannappar*[1]. Another decision relied upon by Mr. Jagadisa Ayyar was *Chinniah Thevar* v. *Badsha*[4], where Clerk, J., has agreed with Yahya Ali, J. that where a judicial Officer named was only acting as a *persona designata* and not as a Court following several decisions on the point that were cited before him including the decision of the Full Bench in *Lakshmanan Chetty* v. *Kannappar*[1].

As against these decisions Mr. Gopalaswami Ayyangar has invited my attention to two decisions in *Ramaswami Goundan* v. *Muthu Velappa Gounder*[5], and *Ahamad Thambi Maracayar* v. *Basava Maracayar*[6], wherein it has been held that a Judge hearing an election petition before him under the Rules issued by the Local Government, whether under the Local Boards Act or under the District Munisipalities Act, was acting not merely as a *persona designata* but also as a Court in the exercise of his ordinary jurisdiction extended for that purpose. As already stated this was the tenor of the decision in *Parthasarathi Naidu* v. *Koteswara Rao*[2]. In addition to this Mr. Gopalaswami Ayyangar also invited my attention to the decision of the Privy Council in *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[7], which he stated had application to the facts of the present case. The decision in this authority cited by the learned counsel for the petitioner is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute, the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorized by such Rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal.

In *Appaya Gounder* v. *Sheik Dawood Sahib*[8], relied upon by the learned counsel for the petitioner, it was held that the High Court had jurisdiction to interfere with the decision of a subordinate Court, even though it was functioning as a *persona designata*.

Another decision relied upon by the learned counsel for the petitioner is the one in *Rajam Bharathi* v. *Damodaram Naidu*[9]. In that decision Balakrishna Ayyar, J., held that the order of the Court of Small Causes, notwithstanding the fact that it was said to be final, was subject to revisison if the order was without jurisdiction.

The latest decision to which my attention has been invited by the learned counsel for the petitioner is the one reported in *Nookamma* v. *Election Commissioner*[10]. In that decision the question that arose for consideration was whether under the Rules framed for decision of disputes regarding elections to the Village Panchayat the District Munsif or the Election Commissioner had power to condone the delay in the presentation of an election petition. A Bench of the Andhra High Court held that since the Election Commissioner was acting only as a *persona designata* he had no general jurisdiction to condone the delay in the presentation of petitions under the Limitation Act.

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1. (1926) 51 M.L.J. 738 : I.L.R. 50 Mad. 121 (F.B.).
2. (1923) 46 M.L.J. 201 : I.L.R. 47 Mad. 369.
3. (1947) 1 M.L.J. 207.
4. (1948) 1 M.L.J. 314.
5. (1922) 44 M.L.J. 1 : I.L.R. 46 Mad. 536.
6. (1922) 44 M.L.J. 69 : I.L.R. 46 Mad. 123.
7. (1948) 1 M.L.J. 41 : L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 (P.C.).
3. (1927) M.W.N. 842.
9. (1950) 1 M.L.J. 332.
10. (1958) 1 An.W.R. 241.

A few other decisions were also relied upon by Mr. Jagadisa Ayyar, namely *R. S. Navalkar* v. *Mrs. Sarojini Naidu*[1], and also *Deivanayagam Pillai* v. *Diwan Mohideen Rowther*[2]. I do not think that it is necessary for me to refer to these decisions in detail.

I have heard the arguments of the learned counsel on both sides and after a consideration of the import and significance of all the decisions, that have been cited before me, in my judgment the Rule issued by the Government under section 19 (1) of the Madras Village Panchayats Act prescribing the judicial authority to be the District Munsif having territorial jurisdiction in the area, wherein the Panchayat is situated, could not have intended the Munsif's Court as such but only the Officer presiding over the Court and having jurisdiction over the territory in which the Panchayat is situated. If it were the Court that was intended by the Rule that was framed for the purpose, nothing could have been difficult for the authority to state that it was the District Munsif's Court that was to function in such matters. The frame of the Rule and also the proviso that has been attached to it, namely, that the District Judge shall have power to transfer any petition from one District Munsif to another District Munsif within his jurisdiction is also significant of the fact that what was intended was only the person or the Officer that was being named to deal with the petitions under section 19 (1) and not the civil Court subordinate to the High Court. It is true that in the Rules framed for decision of matters relating to disputes on elections they have been set out elaborately, and it has been made abundantly clear that the person designated is not the civil Court but only he has to act as a *persona designata*. A similar elaborate provision could have been made when the Rules were framed for the purposes of section 19 (1) of the Act; but the lack of such elaborateness would not in any way detract from the tenor of the Rule, namely, that it was only intended to be an Officer named or designated that was to serve as the Tribunal to enquire into petitions under section 19 (1) and not the ordinary civil Court subordinate to the High Court. Neither counsel has been able to point out to me any Division Bench's decision of this Court on this question after the Full Bench decision in *Lakshmanan Chetty* v. *Kannappar*[3]. Both sides have only been able to lay their hands on decisions of single Judges following the decision in *Lakshmanan Chetty* v. *Kannappar*[3]. The ruling of the decision in *Lakshmanan Chetty* v. *Kannappar*[3], seems to make it clear that it did not choose to follow the previous Full Bench decision in *Parthasarathi Naidu* v. *Koteswara Rao*[4], but it really went to the extent of distinguishing that decision. With due respect, not only am I bound to follow the Full Bench decision in *Lakshmanan Chetty* v. *Kannappar*[3], but I am myself in complete agreement with the view expressed therein. In that view I do not think this Civil Revision Petition could be considered to be competent. The District Munsif having been named and designated as a Judicial authority to enquire into the petitions under section 19 (1) of the Madras Village Panchayats Act is not a civil Court, which could be said to be subordinate to the jurisdiction of the High Court so as to be brought within the purview of section 115 of the Civil Procedure Code. It may be that as a Tribunal any Election Commissioner or any other judicial authority acting as the *persona designata* may be subject to the revisional jurisdiction of the High Court. But that right or remedy could be invoked only when there is want of jurisdiction in the order or the decision passed by the Tribunal. In this case it is not contended that the District Munsif acting as *persona designata* has acted without jurisdiction or even acted in excess of the jurisdiction. On the other hand, the point raised is only that in view of the fact that this District Munsif acting as the *persona designata* in regard to the enquiry in question is not subordinate to the Civil Court, the High Court could not exercise any jurisdiction over it, unless it was positively established that there was lack of jurisdiction in the order passed.

1. A.I.R. 1923 Bom. 421.
2. (1922) 44 M.L.J. 39.
3. (1926) 51 M.L.J. 738 : I.L.R. 50 Mad. 121 (F.B.).
4. (1923) 46 M.L.J. 201 : I.L.R. 47 Mad. 369 (F.B.).

Mr. Gopalaswami Ayyangar, however, argued that even if it were to be held that no Civil Revision Petition was maintainable against the order of the learned District Munsif, still Article 227 of the Constitution could come into play and his client should be given permission to convert the Revision Petition into an application under Article 227. In *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*[1], cited by the learned counsel for the petitioner it was held that all Election Tribunals are under the jurisdiction of the High Court and that such jurisdiction could be exercised by the High Court under Article 227 of the Constitution.

As against this Mr. Jagadisa Ayyar has invited my attention to a decision of the Allahabad High Court in *Kumari* v. *State and another*[2], where the Court refused permission to convert a Civil Revision Petition into an application for a writ of *certiorari* or an application under Article 227 of the Constitution. It has been conceded by the learned counsel for the respondent on this point that the proper remedy to be sought by the petitioner would be only under Article 226 of the Constitution and not an application for converting this Civil Revision Petition into an application under Article 227. I agree with this contention of the learned counsel for the respondent. It is open to the petitioner to file an application for a writ under Article 226 of the Constitution especially in view of fact that the bar of limitation does not affect the petitioner seeking such a relief in this High Court. The District Munsif acting even as a *persona designata* is a Tribunal and the orders of that Tribunal could be questioned by means of a writ application. I do not think that in such circumstances there is need for me to grant permission to the petitioner to convert this Civil Revision Petition into an application under Article 227 of the Constitution.

In the result the preliminary point raised on behalf of the respondent is upheld and this Civil Revision Petition fails. I have not gone into the merits of the case and it is not necessary for me to do so in the view I have taken on the preliminary point. I do not think I need order costs in this petition. The petition fails and is dismissed without costs.

V.S. —————— *Preliminary point upheld and Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

A. P. Paramasivan .. *Petitioner**

v.

Sevasami Nadar .. *Respondent.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), section 2 (a)—Agriculturist—Exception—Joint family—Payment of kist in excess of the limit prescribed by Statute—Notional share of each member below the statutory limit—Such members if entitled to the benefits of the Act.

The liability to pay kist on lands owned by a Hindu joint family is an entire one and it will not be open to any member to say that he will pay the proportionate kist on his share of the family property unless there is a partition. So long as he remains joint he is liable to pay the entire land revenue due upon the family lands. Hence when such a family is assessed to land revenue exceeding the statutory limits every member of the family will be excluded from the benefit of the Act. It is not open to such a member to contend that his share of the land revenue, if a partition had taken place would be below the statutory exception.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Ambasamudram, dated 8th December, 1955 and passed in S.C.S. No. 342 of 1955.

S. V. Rama Iyengar, for Petitioner.

S. Jagannadan for *T. R. Ramachandran,* for Respondent.

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1. (1955) 1 M.L.J. (S.C.) 157 : 1955 S.C.J. 267. 2. A.I.R. 1957 All. 495.

*C.R.P. No. 388 of 1956. 3rd July, 1959. (12th Asadha, 1881—Saka.)

The Court delivered the following

JUDGMENT.—This is a petition to revise the decree of the District Munsif, Ambasamudram, dismissing the suit filed by the plaintiff. The suit was laid for recovery of Rs. 492-14-0 due on a promissory note executed by the defendant on the 18th of April, 1949 in favour of the plaintiff's assignor. There was a payment of Rs. 10 towards interest on the 29th March, 1952. Thereafter, there were no payment. It is alleged in the plaint that though the suit was filed on 1st July, 1955, it was not barred, as the defendant was an agriculturist entitled to the benefit of Madras Act I of 1955. This Act extended the period within which suits for money should be filed against agriculturists by a period of four months. *See* section 3. The question, therefore, is whether the defendant is a person who falls within the definition of 'agriculturist' contained in section 2 of the Act. The learned District Munsif held that he did not fall under the definition, and that, therefore, the suit was not saved from the bar of limitation. Mr. Rama Iyengar, the learned Counsel for the petitioner, contends that since the defendant is a member of the joint family which consists of another male member, the kist for the lands belonging to the joint family should be apportioned to find out how much would fall to the share of the defendant.

The admitted facts are that the lands belong to the joint family of the defendant which consists of himself and his son, and that the family have to pay kist of Rs. 250 per year. It is said that since the defendant is entitled to a half share in these lands, he is also liable to pay only a half share of the land revenue and the kist of the family lands payable by him would be only Rs. 125, well below the limit of Rs. 150 fixed in section 2 (*a*) (i) of Madras Act I of 1955. Section 2 (*a*) speaks of a person having interest in agricultural lands. Admittedly the family of the defendant is joint. On the date when the suit ought to have been filed, the defendant had an interest in every item of the joint family property which *inter alia* consists of agricultural lands. It cannot be said that his interest in the agricultural lands extended only to half of them and not to the entire lands.

Section 2 (*a*) (i) is an exception to section 2 (*a*). That clause takes out of section 2 (*a*) the class of agriculturists who would otherwise fall within section 2 (*a*). The test is payment of kist, land revenue, peskash or quit rent exceeding one hundred and fifty rupes per annum in any year after 1952-53. Mr. Rama Iyengar's argument is that since the defendant owns notionally only a half share in the family properties, he is liable to pay only a half share of the land revenue due on the lands. This runs counter to accepted notions of liability for payment of kist due to Government. A number of lands are entered in one patta and the land revenue payable for all those lands is totalled up. Yet it could not be said that the liability to pay such land revenue could be distributed on the various lands included in the holding under that patta. Similarly, even though the defendant may, if a partition were to be effected, be entitled to a half share of the family lands, he could not contend that he would pay a half share of the land revenue payable for the family lands. Certainly, so long as he remains joint, he is under a liability to pay the entire land revenue due upon the family lands to the Government. It follows that the defendant is a person who is liable to pay land revenue exceeding Rs. 150 per annum. He is, therefore, hit by section 2 (*a*) (i) of the Act. The learned District Munsif was right in holding that the plaintiff could not rely upon section 2 (*a*) (i) for escaping the bar of limitation. The dismissal of the suit is, therefore, proper and this petition is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Mariamman Handloom Factory by its Proprietor P. M. M. Adinarayana Nadar and others .. *Appellants**

v.

The State of Madras by its Secretary, Department of Industries, Labour and Co-operation, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947) (as amended by Act XVIII of 1952), section 10 (1) (*c*) *and* (4)—*Jurisdiction of Industrial Tribunal—Reference by Government—Question whether weavers employed in handloom factories were workmen and the dispute was an industrial dispute—Jurisdiction of Tribunal to decide initial question of jurisdiction—Issue, if to be decided by High Court only.*

Where, in a reference by the Government to the Industrial Tribunal under section 10 (1) (*c*) of the Industrial Disputes Act, of certain questions of difference between the managements of certain handloom factories and the weavers engaged therein, it is contended that the weavers were not " workmen " as defined in section 2 (*s*) of the Act and that there was no " industrial dispute " within the meaning of section 2 (*k*) of the Act, it cannot be said that the question can only be decided by the High Court in proceedings under Article 226 of the Constitution and cannot be decided by the Industrial Tribunal.

While the High Court has certainly jurisdiction to decide the question and would, in a proper case, be justified in dealing with the matter at the earliest stage before even the Industrial Tribunal had begun its proceedings, it does not follow that the Indussrial Tribunal itself has no jurisdiction to decide such an issue.

The Tribunal has the initial jurisdiction to decide the jurisdictional issue and to come to a conclusion on the issue raised before proceeding to hear the reference. If it comes to a right conclusion that the weavers are workmen and that the dispute is an industrial dispute, it has jurisdiction to proceed further with the adjudication of that dispute. If, however, it comes to the conclusion that the dispute is not an industrial dispute, it can have no jurisdiction to proceed any further. But it cannot give itself jurisdiction deciding wrongly such a jurisdictional issue. If the Tribunal wrongly decides such a question, the error can be corrected by appropriate proceedings under Article 226 of the Constitution. The party aggrieved by the decision of the Tribunal on the point can always approach the High Court to issue a writ of prohibition to restrain the Tribunal from proceeding with the inquiry or a writ of *certiorari* to quash the proceedings so far taken resulting in the erroneous decision.

D. C. Works Ltd. v. *State of Saurashtra*, (1957) S.C.J. 208 : 1957 S.C.R. 152 : A.I.R. 1957 S.C. 264, relied on.

There is nothing in section 10 (4) of the Act (newly added by the Amending Act of 1952), which precludes, expressly or impliedly, the Industrial Tribunal from deciding whether there is an Industrial dispute and whether the dispute is between employer and workmen.

Appeals under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopalan, dated 31st July, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. Nos. 267 of 1957, 177 of 1957, 264 of 1957, 265 of 1957 and 266 of 1957, presented under Article 226 of the Constitution of India, to issue a writ of prohibition directing the second respondent to forbear from proceeding with the enquiry of I.D. No. 36 of 1955 in pursuance of the Notification G.O. No. Ms. 2470 of the Department of Industries, Labour and Co-operation, Madras, dated 20th July, 1955, in so far as the petitions respectively are concerned.

R. Viswanathan for *T. R. Srinivasan* and *T. Ramalingam*, Advocates for Appellant.

The Additional Government Pleader (*M. M. Ismail*), on behalf of the 1st and 2nd Respondents in all the Appeals.

K. V. Sankaran, for the 3rd Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The above appeals are from the judgment of Rajagopalan, J., disposing of a batch of petitions filed under Article 226 of the Constitution by the managements of certain handloom factories in the following circumstances. On

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* W.A. Nos. 103 and 144 to 147 of 1957. 15th July, 1959. (24th Asadha, Saka—1880.)

the 20th July, 1955, the Government in exercise of the powers conferred by section 10 (1) (*c*) of the Industrial Disputes Act, 1947, directed that an Industrial Dispute which had arisen between the workers and the managements specified in the First Schedule to the order, in respect of matters specified in the Second Schedule thereto be referred, for adjudication, to the Industrial Tribunal having its place of sitting at Madras. The matters mentioned in the Second Schedule were (1) whether the wage cut made in November, 1954, should be restored, and if so, from what date and (2) Fixation of the number of festival holidays. Though the reference mentions the dispute to be between the workers and the managements in general terms, it is common ground that the controversy is between the weavers who work for the several factories, and respective managements, and the main question for consideration is whether these weavers are workmen within the definition of that term in the Industrial Disputes Act, section 2, clause (*s*). The contention of the managements was that as these weavers were not workmen, there was no industrial dispute, because according to the definition in clause (*k*) of section 2 of the Act, 'industrial dispute' means, *inter alia*, any dispute or difference between employers and workmen. Before the Tribunal could take up the matter for adjudication, the managements first filed an application for the issue of a writ of *certiorari* to quash the reference itself. But that petition was dismissed by this Court on 12th February, 1957. Subsequently the applications out of which these appeals arise were filed by the managements of the five factories praying for the issue of writs of prohibition directing the Industrial Tribunal, Madras, to forbear from proceeding with the enquiry of the dispute which had been referred to it by the Government. Before the learned Judge, Rajagopalan, J., who dealt with the petitions, the main contention was that the weavers who were concerned in the dispute were not workmen as defined in section 2 (*s*) of the Act. This legal position was not accepted by the weavers. The sole question is whether this controversy should be decided first by the Industrial Tribunal or can only be decided by this Court in the petitions under Article 226. Rajagopalan, J., makes it abundantly clear that this Court certainly had jurisdiction to decide the question and in a proper case this Court would be justified in dealing with the matter at the earliest stage before even the Industrial Tribunal had begun its proceedings. But the learned Judge was equally clear that this did not necessarily imply that the Industrial Tribunal itself had no jurisdiction to try such an issue. The learned Judge observed :

> " In my opinion, the Tribunal has that jurisdiction. If it comes to a right conclusion that it is an industrial dispute, it has jurisdiction to proceed further with the adjudication of that dispute. If, however, it comes to the conclusion that the dispute is not an industrial dispute it can have no jurisdiction to proceed any further. As a statutory Tribunal whose jurisdiction is to be sought within the terms of the Statute which created it, it cannot give itself jurisdiction by deciding wrongly such a jurisdictional issue. If the Tribunal wrongly decides such a question, the error can be corrected by appropriate proceedings under Article 226 of the Constitution."

With respect to the learned Judge, we are in entire agreement with this statement of the law. In this view the learned Judge refused to issue writs of prohibition and dismissed the petitions. Learned counsel for the appellants was unable to cite any authority to show that the view is not sustainable. Though the point as such did not come up for discussion in the case, the judgment of the Supreme Court in *D. C. Works Ltd.* v. *State of Saurashtra*[1], supports by implication the view taken by Rajagopalan, J., which accords with our view. Learned counsel for the appellants relied on a new sub-section added by the amending Act of 1952 to section 10 of the Industrial Disputes Act which runs thus :

> "10 (4). Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto."

We do not think that this provision has any material bearing on the question now in issue. It has reference to the matters mentioned in the order of the Govern-

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1. (1957) S.C.J. 208 : 1957 S.C.R. 152 : A.I.R. 1957 S.C. 264.

ment as matters in dispute between the parties. It does not preclude expressly or impliedly the Tribunal from deciding whether there is an industrial dispute and whether the dispute is between employers and workmen.

Learned counsel for the appellants tried to support his contention that the Tribunal would not have jurisdiction to decide the question of fact, a decision on which is a preliminary requisite to further valid procedings by the Tribunal, by referring to some of the other provisions in the Act. For instance learned counsel referred to section 15 of the Act. The argument so far as we are able to gather was that the Industrial Tribunal should always pass an award in respect of any reference made to it under section 10, but if the Tribunal were to hold that it had no jurisdiction to adjudicate on the matters referred to it, the Tribunal would not be able to pass an award. Now an award has been defined as an " interim or a final determination of any industrial dispute or of any question relating thereto...." It will not be straining the language of the statute to say that a question whether there is an industrial dispute within the definition of that term in the Act is certainly a question relating to the determination of any industrial dispute. There may be several occasions when the Industrial Tribunal would have no oportunity of passing an award which can in its terms be implemented by the parties. Take for instance a case when it transpires during the proceedings that there is no dispute between the management and the workers in respect of a matter mentioned in the Government Order of reference. Then surely the Tribunal will not be able to pass an award. The Tribunal will have to close the proceedings and report to the Government that there is no matter in dispute between the workers and the management. Likewise, if the Tribunal were to hold that the weavers concerned in the reference are not workmen falling within section 2 (*s*) of the Act, then the award of the Tribunal would consist in a declaration that they would not have the right to demand an adjudication of the dispute.

In our opinion the Industrial Tribunal has initial jurisdiction to decide the preliminary jurisdictional issue. It is not necessary for us to define the extent of the power of this Court to interfere with the decision of the Tribunal on the point. In the appeals before us there has yet been no such decision by the Tribunal.

As we have mentioned above, the aggrieved party, that is the party aggrieved by the decision of the Tribunal on the point, can always approach this Court to issue a writ of prohibition to restrain the Tribunal from proceeding with the enquiry. As Rajagopalan, J., has said :

> " If an Industrial Tribunal wrongly decides the jurisdictional issue and comes to the conclusion that the dispute is an industrial dispute when it is not, the aggrieved party can ask for the issue of a writ of prohibition to restrain the Industrial Tribunal from proceeding further in the matter. The aggrieved party can also ask for a writ of *certiorari* to quash the proceedings so far taken resulting in the erroneous decision...."

It is unfortunate that though the reference was made by the Government in July, 1955, the Tribunal to this day has not taken up the enquiry. In the view we have taken the appeals are dismissed that there will be no order as to costs.

P.R.N. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Arya Bhavan, Madras by its partner C. M. Sharma .. *Appellant**

v.

M. S. Narayana Rao and another .. *Respondents.*

Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), section 22—Dismissal of a worker—Dispute taken up by all the workmen represented by their union—Workmen concerned in the appeal.

The question whether a particular workman is or is not a workman concerned in an appeal pending before the Labour Appellate Tribunal is a question of fact depending upon the circumstances of each case.

When a reference is made by the Government of a dispute which relates to the dismissal of one or a few of the workers and the dispute is taken up by all the workers represented by their union, the workmen and not only the particular workman who has been dismissed are parties, to the reference, and they would be 'workmen' concerned in an appeal.

Newtone Studios v. *Ethirajulu*, (1957) 2 M.L.J. 147, referred.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopalan, dated 4th September, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 547 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order of the second respondent, dated 23rd March, 1956, in Misc. Case No. III-C-429 of 1954 published at page 10 of the Supplement to Part I of the *Fort St. George Gazette,* dated 25th April, 1956 and quash the said order.

R. M. Seshadri, for the Appellant.

K. V. Sankaran, for the 1st Respondent.

The Additional Government Pleader (*M. M. Ismail*), for the 2nd Respondent.

The Order of the Court was made by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopalan, J., dismissing a petition filed by the appellant under Article 226 of the Constitution for the issue of a writ of *certiorari* to quash an order of the Chairman, Central Government Industrial Tribunal, Madras, dated 23rd March, 1956, in the following circumstances. The appellant is the management of a Restaurant carrying on business in Madras under the name and style of Arya Bhavan. In 1953 the appellant dismissed one of its employees, one Janardhana Bhatt on the ground that he was engaged in a scuffle with a customer of the restaurant and assaulted him in the course of the quarrel. This led to a reference by the Government of Madras of an industrial dispute between the workers and the management of Arya Bhavan, Madras, with respect to the justification of the dismissal of the said Janardhana Bhatt. The workers were represented by the City Hotel Workers' Association. The Industrial Tribunal made an award that the dismissal of Janardhana Bhatt was unjustified and directed that he should be reinstated with back wages from the date of his dismissal to the date of his reinstatement. The Government duly notified the award by their order, dated 27th January, 1954. Against this award the appellant preferred an appeal to the Labour Appellate Tribunal, Madras, on 25th February, 1954. While the appeal was pending the appellant dismissed on 29th April, 1954, the contesting respondent, M. S. Narayana Rao on the ground that he was found guilty of stealing. Thereupon the respondent filed an application before the Labour Appellate Tribunal under section 23 of the Industrial Disputes (Appellate Tribunal) Act, 1950. That application was eventually disposed of by the Chairman, Central Government

* W.P. No. 115 of 1957. 31st July, 1959. (9th Sravana 1881—Saka.)

Industrial Tribunal, Madras, by his Order, dated 23rd March, 1956. Before the Appellate Tribunal objection was raised by the management that the respondent was not entitled to file an application as he was not a " workman concerned " in the appeal but this objection was overruled. The Appellate Tribunal went into the merits of the case also and held that the dismissal of the respondent was not justified. The Tribunal, therefore, directed the management to reinstate the respondent and pay him arrears of wages. To quash this order the appellant filed a petition from which this appeal arises. The main ground taken before Rajagopalan, J., before whom the petition came on for final disposal was that the respondent was not entitled to file any application as he would not be a " workman concerned " in the appeal pending before the Appellate Tribunal in the matter of Janardhana Bhatt. Rajagopalan, J., held against the appellant. Hence this appeal.

Section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950 (Act XLVIII of 1950) runs thus :—

> " During the period of 30 days allowed for the filing of an appeal under section 10 or during the pendency of any appeal under this Act, no employer shall—(*a*) alter to the prejudice of the workmen concerned in such appeal the conditions of service applicable to them immediately before the filing of such appeal or (*b*) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such appeal save with the express permission in writing of the Appellate Tribunal ".

The contention of Mr. R. M. Seshadri, learned counsel for the management was that the appeal pending before the Appellate Tribunal related to the propriety of the dismissal of a single workman and it cannot be said that any other workmen " were concerned " in such an appeal. His contention is thus set out in the affidavit filed by the appellant :

> " In this case the first respondent is in no manner and by no means connected with or concerned in the appeal pending before the Labour Appellate Tribunal which was in relation to the personal misconduct of an employee of the petitioner involved in an incident of beating a customer."

On behalf of the workers it was contended that a restricted meaning should not be given to the expression " workmen concerned " in such appeal. As the workers in the Arya Bhavan hotel were parties to the appeal pending before the Appellate Tribunal and the first respondent was one of such workers he was also concerned in the said appeal. Both the learned counsel referred us to several decisions of the Industrial Tribunals and to a reported decision of Rajagopalan, J. After a consideration of all these decisions we have come to the conclusion that the question whether a particular workman is or is not a " workman concerned " in an appeal pending before the Labour Appellate Tribunal is a question of fact. In some of these decisions it has been pointed out that the word used is " concerned " and not "interested". Obviously there is a difference in the meaning of these two words. " Concerned " connotes a more intimate and direct relation to the matter than the word " interested". The distinction can be well brought out by giving a concrete instance. If a dispute arises between the management and the workers of a particular industrial establishment, say as regards the principles on which bonus should be granted it would be not inappropriate to say that even workers in other industrial establishments are also " interested " in the result of the adjudication. If the matter were to be taken up to a higher Court like the High Court or the Supreme Court the interest would be all the greater because if this Court or the Supreme Court were to lay down certain principles they would govern not only the particular establishment but every other establishment as well. But it will not be right to say that the workers of all the other establishments are "workers concerned" in the pending reference or pending appeal. It is, therefore, necessary to give to the word " concerned " a more restricted meaning than to the word "interested".

There may be cases in which it would be easy to hold that certain workmen are not concerned in the pending appeal, arising out of a particular dispute. It has been held for instance that where a dispute relates, to the payment of bonus for a particular year, say, 1954-55, the workmen who were employed subsequent to that period would not be " workmen concerned " in the appeal relating to the ques-

tion of bonus for that year. Vide *Kalachan Talukdar* v. *Standard Vacuum Oil Company*[1] and also *Shankar Rao Domajee and another* v. *Model Mills Ltd.*[2]. It is equally clear that, if a particular company has several branches dealing with different categories of businesses, workmen employed in one department would not be concerned in a dispute between the management and the workers of quite a different department. In *Bhathi Bhura* v. *Associated Cement Companies Ltd.*[3], it was held that workmen employed in certain quarries (mines) would not be workmen concerned in a dispute between the workers in a cement factory and the management of that factory though the same company was the proprietor of both the cement works and the quarries. A similar instance of such a case is found in *Jawahar Mills* v. *Subbarayan and two others*[4].

A real difficulty arises when a reference is made by the Government, of a dispute which relates to the dismissal or retrenchment of one or a few of the workers and the dispute is taken up by all the workers represented by their union. It is now well established that the Government cannot make a reference of a dispute between one employee and the management. It is necessary that the employee's case must be taken up by all the workers collectively. That is why in several references including that relating to Janardhana Bhatt though the subject-matter for adjudication is the propriety or the validity of the dismissal of one worker the actual reference to the Tribunal is of an industrial dispute between the workers and the management of the establishment. In this sense the workmen, and not only the particular workman who has been dismissed, are parties to the appeal. In the context the observations of Das, J., as he then was in the decision of the Supreme Court in *Automobile Products of India, Ltd.* v. *Rukmaji Bala*[5], as regards the object of section 22 of 1950 Act should be borne in mind. It is true that in that case the Supreme Court was not called upon to decide the precise scope of the expression " workmen concerned in such appeal ". But the object of the section as explained by his Lordship throws considerable light on the meaning to be attached to the expression " workmen concerned in such appeal ". His Lordship said :—

> " The object of section 22 of 1950 Act like that of section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of these proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate the already strained relation between the employer and the workmen."

The management may out of vindictiveness and annoyed by the fact that all the workmen had taken up the cause of the dismissed employee try to victimise such workmen or the management might by such victimisation try to stifle the pending proceedings by frightening the workers by disciplinary action against other workmen. In one sense it is correct to say that the other workmen are not directly concerned in the subject-matter of the pending proceedings but having taken up the individual dispute and made it a collective one all such workmen are in a sense concerned in the appeal. We have received considerable assistance from the elaborate discussion of the question by Rajagopalan, J., in *Newtone Studios* v. *Ethirajulu*[6]. In that case before him 54 workmen were retrenched and the Government made a reference under section 10 of the Industrial Disputes Act to the Industrial Tribunal for adjudication of the dispute, namely, whether the retrenchment of the workmen was justified and whether the workers were entitled to any or what compensation. The parties to the industrial dispute, however, were described as " workers " represented by the Madras State Cinema and Studio Employees' Union and the Madras National Cinema and Studio Workers' Union, Madras and the management of Messrs. Newtone Studios. During the pendency of an appeal pending before the Appellate

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1. (1956) 1 L.L.J. 616.
2. (1956) 1 L.L.J. 433.
3. (1954) 1 L.L.J. 674.
4. (1954) 1 L.L.J. 248.
5. (1955) S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148 : (1955) 1 S.C.R. 1241 (S.C.).
6. (1957) 2 M.L.J. 147.

Tribunal in the matter, one other workman was dismissed and six more were retrenched. The learned Judge held that the workmen whose services had been terminated subsequently were also workers concerned in the pending appeal. The learned Judge refused to accept the contention on behalf of the management that only the 54 workmen who had originally been retrenched should be deemed to be workmen concerned in the appeal within the meaning of section 22 of Act XLVIII of 1950. As the learned Judge pointed out no question could possibly arise with reference to these 54 workmen who were out of employ even before the reference of the industrial dispute under section 10 (1). Acceptance of the narrow interpretation put forward by the learned counsel for the management would mean that during the pendency of the appeal the management could effect further retrenchment and that the only remedy of the workers affected by the retrenchment was to seek a fresh reference under clause 10 (1) (*c*) of the Industrial Disputes Act. The learned Judge did not accept such an interpretation. With respect we agree with the principle of this decision of Rajagopalan, J. No other decision of this Court was brought to our notice in which a contrary view was taken.

Mr. R. M. Seshadri, learned counsel for the appellant drew our attention to a recent judgment of the Bombay High Court in *New Jehangir Vakil Mills* v. *Industrial Tribunal*[1], in support of his contention that a narrower interpretation should be placed on the words "workmen concerned in the appeal". We may at once say that this decision does not bear directly on the case before us as it was concerned with the interpretation of sections 33 and 33-A of the Industrial Disputes Act as amended in 1956. Section 33 of that Act *inter alia* provides that during the pendency of any conciliation proceeding before a Conciliation Officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute no employer shall in regard to any matter connected with the dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or for any misconduct connected with the dispute, discharge or punish whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending. Having regard to the language of this section the learned Judges were called upon to construe the expression "concerned in such dispute". In that case the dispute specified in the schedule to the order of reference to the relative seniority of three workmen in the bleaching department of a textile mill. There was another order of reference in which the subject was the claim for compensation by the workers in the winding and warping department of the same mills. During the pendency of the proceedings consequent on these references three workmen who belonged to the ring-frame department of the mills were dismissed. They filed an application under section 33-A of the Industrial Disputes Act. A preliminary objection was raised on behalf of the management that the three workmen were not concerned in the disputes which were pending before the Tribunal and therefore, the provisions of section 33 would not be attracted and the Tribunal would have no jurisdiction to entertain the workmen's complaint under section 33-A of the Act. The learned Judges held that the petitioners were not workmen concerned in the dispute which was the subject-matter of the pending references because they belonged to a different department. In coming to this conclusion they incidentally referred to section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, and also to section 12 of the same Act. It is not necessary to go into the question whether the learned Judges were right in their interpretation of the expression "workmen concerned in the dispute" which occurs in section 33 of the Industrial Disputes Act. We may point out that the words used in section 22 are not "workmen concerned in the dispute" which is the subject-matter of the appeal but "the workmen concerned in such appeal". It is equally not necessary to decide whether the learned Judges were right in holding that the workmen concerned in

1. (1958) 2 L.L.J. 573.

the appeal under section 22 of the Industrial Disputes (Appellate Tribunal) Act, 1950, would be only persons employed in the establishment or part of the establishment to which the dispute relates. Nor do we feel called upon to pronounce as to who would be entitled to file an appeal under section 22 of the Industrial Disputes Act, 1950. It is sufficient to say that the decision has no direct bearing on the construction of the words " workmen concerned in the appeal ".

After all, section 22 of the 1950 Act does not prohibit the management from taking any disciplinary action against any workmen for misconduct or other sufficient reason. All that it lays down is that the management should inflict the punishment or terminate the services of such workmen with the express permission in writing of the Appellate Tribunal. If the management have good reasons for their proposed action, we do not expect the Appellate Tribunal to withhold arbitrarily such permission.

As the dismissal of the respondent was in contravention of section 22 of the Act of 1950, the dismissal was rightly set aside. In this view it was not necessary for the Chairman of the Tribunal to go into the merits. Indeed, this would in a way preclude him from dealing with an application by the management for permission to dismiss the respondent if they choose to file such an application. As a finding on the merits was unnecessary, we make it clear that we should not be taken as having accepted the decision of the Chairman. The question is left open.

In the result the appeal is dismissed. No costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Side.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

C. Cunniah and Co., by partners M. Anjaneyalu and others .. *Appellants**

v.

Balraj and Co., by partners S. Rajaratnam Chettiar and another.. *Respondents.*

Copyright Act (III of 1914)—Copyright—In what works it could exist—Representation of a deity in human form—If entitled to copyright—Tests of infringement.

It is well established that in order to obtain copyright in literary, dramatic, musical or artistic works the subject dealt with need not be original nor the idea, expressed be something novel. What is required is the expenditure of original skill or labour in execution.

Though a pictorial representation of the Hindu deity, Lord Balasubramanya in human form is a subject common to every one, still if a picture drawn by an artist is the result of skill and labour and the deity is represented in a particular posture, with ornaments and vahanam, etc., the artist can claim copyright in the product of his labour.

In order to decide whether a particular picture is a copy of another or not it should be seen whether a substantial part of the one picture finds a place in the other. Though it is impossible to lay down any rule which could serve as a test of what constitutes a copy or colourable imitation, still the effect produced in the minds of people by seeing the pictures together might serve as a useful guidance.

On appeal against the Judgment and the Decree of the Honourable Mr. Justice Ramaswami, dated 5th March, 1954 and made in exercise of the Original Jurisdiction of this Court in C.S. No. 127 of 1953.

T. Venkatadri and *A. K. Pavitran,* for Appellants.

V. Seshadri and *K. S. Ramamurthi,* for Respondents.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This appeal against the judgment and decree of Ramaswami, J., in C.S. No. 127 of 1953 arises out of a suit instituted by the appellants as plaintiffs for the reliefs of injunction, damages and accounts against the respondents. The appellants, Messrs. C. Cunniah and Co., are a firm of merchants carrying on

* O.S. Appeal No. 106 of 1954. 4th February, 1959.
(15th Magha of Saka—1880).

business in Madras City in pictures, picture frames, etc. In 1932, according to the case in the plaint, one Sri T. M. Subramaniam drew a picture, M.O. 1 of Lord Balasubramanya and gave it the title of Mayura Priya. On 13th July, 1938, he assigned the copyright in this picture to the appellant firm. From 1940 onwards, the appellant-firm were making and selling printed copies of this picture to the public. There was, however, a temporary stoppage of the sale between 1946 and 1950 owing to scarcity of printing materials due to war conditions. However, the printing and sale were resumed from 1950 onwards. The appellant-firm got this picture registered under the Trade Marks Act of 1940 some time in 1952. Some time before October, 1952, it came to the knowledge of the appellant-firm that the respondent-firm was printing and selling copies of a close and colourable imitation of the appellant's picture under the style of Bala Murugan. The appellants' case is that the picture 'Bala Murugan' printed and sold by the respondents is a colourable imitation of the picture. 'Mayura Priya', in which the appellant-firm owns the copyright. Though called upon to cease the sale of the picture 'Bala Murugan', the defendants-respondents refused to comply with this demand. The plaintiffs-appellants, therefore, came forward with the suit asking for an injunction prohibiting the respondent-firm from printing or selling the picture 'Bala Murugan', and also for a decree for damages in the sum of Rs. 2,000 for infringement of the copyright in their picture 'Mayura Priya' and for an account of the profits made by the defendants-respondents by the sale of their picture (Bala Murugan), and for seizure of the unsold copies of that picture.

The respondents-defendants contended that their picture was an independent production by the artist D.W. 1 and was not a copy of the plaintiff's picture 'Mayura Priya'. They also contended that the appellants had not acquired copyright in the picture known as 'Mayura Priya', because, the subject dealt with in that picture was a common subject, in which no copyright could be acquired by anyone.

The claim in the plaint was put forward both as an infringement of copyright and as an infringement of the registered trade mark right. However, during the trial, the case of infringement of trade mark was given up, as admittedly the picture 'Mayura Priya' is not used as a trade mark in relation to any class of goods.

The learned Judge, Ramaswami, J., who tried the suit, came to the conclusion that the artist D.W. 1 had drawn the defendants' picture 'Bala Murugan' from his own trained imagination having regard to the conventional ideas and without any help derived from or resort to the picture 'Mayura Priya'. On the question of the picture 'Mayura Priya' being the subject of copyright, the learned Judge found in favour of the appellants. However he dismissed the suit on his finding that the defendants had not infringed the copyright of the plaintiffs in their picture 'Mayura Priya'.

Mr. K. S. Ramamurthi, learned counsel for the respondents, made a feeble attempt to contend that no copyright could be acquired in the picture, M.O. 1 styled 'Mayura Priya', because, it was the representation of a common subject like a painting of the deity 'Balasubramanya' made from conventional ideas as to his appearance in human form. It is well established that, in order to obtain copyright protection for literary, dramatic, musical and artistic works, the subject dealt with need not be original, nor the ideas expressed be something novel. What is required is the expenditure of original skill or labour in execution and not originality of thought. Thus, though pictorial representation of Lord Subrahmanya in a human form is a subject which is common to everyone, still if a picture of Lord Balasubrahmanya drawn by an artist made up of conventional ideas as to his posture, his form, the ornaments he wears, the vahanam he uses and other matters, the picture produced is still the result of skill and labour of the artist; and it certainly entitled him to claim copyright in the product of his labour. No more need be said to reject the contention of Mr. K. S. Ramamurthi that the appellant-firm did not possess copyright in the picture 'Mayura Priya'.

The more importan argument advanced by Mr. K. S. Ramamurthi was that, granting that the artist employed by the respondents had the picture 'Mayura

Priya' before him and drew inspiration from that picture for drawing his own picture 'Bala Murugan', still, the question would be whether the respondents' picture was a mechanical copy of the appellants' picture, or, whether it was an independent production of the artist, employing his own skill and labour. Before discussing this question, we would briefly notice the statutory provision that touches upon this matter. The provisions of the Indian Copyright Act, 1957, do not apply to this case, and we have to look to the provisions of Indian Copyright Act, 1914. This Act made the English law of copyright in sections 1 and 2 Geo-V., Chapter 46, applicable to India with certain modifications. The definition of infringement of copyright given in section 35 of the last-mentioned Act runs thus :

"Infringing when applied to a copy of a work in which copyright exists means any copy, including any colourable imitation made or incorporated or imported in contravention of the provision of this Act."

Though there are other modes of infringement of a copyright even in regard to an artistic work, in this case, we are only concerned with infringement by making a copy or a colourable imitation of the appellants' picture 'Mayura Priya'.

The sole question for our consideration, therefore, is whether the respondents' picture is a copy or a colourable imitation of the appellants' picture. In *Hansftaenzl* v. *Smith*[1], Kekewich, J., defined the copy thus:

"A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it."

Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondents' picture must get the suggestion that it is the appellants' picture. In this sense, the points of similarity or dissimilarity in the picture assume some importance, and, therefore, Mr. R. Gopalaswami Ayyangar's criticism of the approach to the case by the learned Judge may not be entirely justified. Mr. Gopalaswami Ayyangar for the appellants contended that the learned Judge had approached the case from the standpoint of a passing-off action and employed the test whether any person looking at the respondents' picture 'Bala Murugan' would mistake it for the appellants' picture 'Mayura Priya'. We agree that this could not be the sole test, though incidentally, the points of resemblance and dissimilarity assume some importance in the case in finding out whether, taken as a whole, the respondents' picture produces the impression in the mind of any observer, which amounts to a suggestion of the appellants' picture.

Mr. K. S. Ramamurthi stressed upon the points of dissimilarity to contend that the respondents' picture was an independent production. For instance, he pointed out to us that the colour scheme of the respondents' picture was different from that of the appellants' picture. Next, he said that the appellants' picture was on a large scale, while the respondents' picture was on a small scale. As further instances, he pointed out that the peacock in the respondents' picture faces left, while the same bird in the appellants' picture faces right. Again, in the appellants' picture, 'Balasubrahmanya' is shown as having one hand round the neck of the peacock, while in the respondents' picture his right hand is shown in the raised posture blessing the world. The background of the pictures was also said to be different, because in 'Mayura Priya', there is a fort-like building in the background, while in 'Bala Murugan' a representation of the Palani temple appears in the background. The rest of the background in both the pictures is identical, consisting of hills, meadows and wild flowers. In our view, nothing turns upon the names of the publishers in the two pictures being different. Coming to the figure of 'Bala Murugan' he is said to be slighter in build and his looks are said to be more adolescent, whereas the figure in 'Mayura Priya' is that of a brown-eyed boy stout in build with chubby cheeks. The result of the comparison is thus expressed by Ramaswami, J.:

"I have therefore inspected for myself the faces on both these pictures and cannot say that, beyond the general resemblance, the faces are of the same young boy-God. There can be no comparison

1. (1905) 1 Ch. 519.

between the dreamy and rather simple looking face of Mayura Priya with the sharp-looking clever and more adolescent attractive face of Bala Muruga. In short, one appears to be a dreamer and the other appears to be a matter-of-fact God interested in the wordly affairs of his bakthas and blessing them.

On this conclusion of mine on the general resemblance of the two pictures, it does not seem to me that any average person would be misled or confused into buying one picture for the other by reason of any close imitation ".

With all respect to Ramaswami, J., we are unable to agree that he applied the correct test in finding out whether the respondents' picture was a copy of the appellants' picture. One picture can be said to be a copy of another picture only if a substantial part of the former picture finds place in the reproduction. In finding out what is substantial part of the appellants' picture, the most prominent part, in our opinion, would be the features of the deity represented as a boy. These features are most prominently displayed in the lineaments of the face, which alone can be said to be the characteristics constituting the personality of the boy. Looking at the faces in both the pictures, there is no room in our minds for any doubt that the face of 'Bala Murugan' in respondents' picture is an exact copy of the face of 'Mayura Priya' in the appellants' picture. Evidence of P.Ws. 2 to 4 goes to show that the picture 'Bala Murugan' could be produced by the process of what is called reversed copy, which consists in a photograph of the figure in 'Mayura Priya' first taken without the head, and, after reversing the position of the trunk, to fix the head to that reversed trunk of 'Mayura Priya'. This reversed process is illustrated in M.Os. 6, 6 (*a*), 7 and 7 (*a*) and explained by the evidence of P.W. 4, the photographer who took these copies. Ramaswami, J., has dismissed this evidence with the remark that the few superficial similarities were only coincidences due to the picture being produced to represent the common stock ideas. He further observed :—

" This is not also a case where the main figure of Mayura Priya has been reduced in size into the offending picture with slight variations in clothes and colour. This is not also a case where we can reduce copying from the fact that the offending picture reproduces also the deviation and mistakes of the picture in which the copyright is claimed."

With all respect to Ramaswami, J., we are unable to agree that, if the picture of the respondents, 'Bala Murugan', was produced as a result of an independent effort by the artist D.W. 1, there would be such striking similarity between the two pictures, especially in the facial lineaments of the boy-God and in the ornaments worn by him and in the features of the peacock and also in the particular manner in which a bunch of hair is curled on the forehead of the face. D.W. 1, the artist said to be responsible for drawing the respondents' picture was questioned in cross-examination upon many points of resemblance, a few of which we will notice below. He was shown the representation of the common elements in all pictures of Balasubrahmanya, namely, the trident, the peacock, the cobra and the adolescent figure of the God in six other pictures exhibited in the case, and was asked to state whether these representations were similar to these items found in the picture in 'Mayura Priya' and whether the representation of these common subjects in M.Os. 1 and 2, the pictures of the appellant and the respondent, were not common. He gave an evasive reply by stating that the difference between M.Os. 1 and 2 was that, while in Mayura Priya the Lord is shown embracing the peacock and having the Vel in his right hand, in 'Bala Murugan', he is having the Vel in his left hand. As regards the trident, the peacock and the cobra in M.O. 2, 'Bala Murugan', being a reproduction of the corresponding object in 'Mayura Priya' , the witness admitted that, if the picture is reversed, that inference would be correct. As regards the number of features of the peacock in both the pictures, the witness admitted that they were identical, namely, 19. Even as regards the number of eyes in the feathers in both the pictures, the witness admitted that they were identical, namely, 22. Concerning the jewels worn round the neck of Bala Murugan both in regard to their pattern and to the number, the witness admitted that there was similarity, though he pointed out there was some difference in the pattern. The *thilakams* on the forehead in both the pictures are identical. Though the colour of the dress worn by the deity is different in

tures are identical. Though the colour of the dress worn by the deity is different in both pictures the pattern is the same. We need not add any more points of resemblance, because, on the subject of ornaments, we find the ornaments worn by 'Bala Murugan' are an exact copy of the ornaments worn by 'Mayura Priya', and every detail including the number of beads, the arrangement of the harams and the marking of the red stones in some of them are identical. Indeed, it cannot be an accident that the same number of features and the same number of eyes in the feathers of the peacock could occur in two independent pictures. Above all, the general impression left on our mind on looking at 'Bala Murugan' is that it is the figure of the Lord depicted in 'Mayura Priya'. It follows that 'Bala Murugan' reproduces in substantial part the special features of the picture of the God in 'Mayura Priya', including his vahanam, the background and the jewels he wears and the features of the face of the figure.

In *Corelli* v. *Gray*[1], Serjeant, J., pointed out the four hypotheses, under which similarities between two works could exist; (1) mere chance, (2) both works being taken from a common source, (3) the plaintiff's work being taken from the defendant's and (4) the defendant's work being taken from the plaintiff's. It is well-settled that an infringement could only come into existence where the defendant's work was taken from the plaintiff's work. In deciding this question, there need not be an exact reproduction to support the inference that the defendant's work was taken from the plaintiff's work. Indeed, every intelligent copying must introduce a few changes; and we find evidence of such intelligent copying in the few changes introduced in the shape of the trident, in the posture of the arms, in the position occupied by the face of the peacock and the cobra and in the pictorial representation of the building in the background. These do not constitute, in our opinion, the criteria of an independent work by the artist employed by the respondents.

It is impossible to lay down any rule which could serve as a useful test of what constitutes a copy or colourable imitation. As was observed by the House of Lords in *Hanfstaengl* v. *Baines & Co.*[2]:

> "At all events, it is much easier to arrive at what does not than to define what does constitute the proper test"

of copying or colourable imitation of one work in another. In that case, the question arose whether sketches published by the "Daily Graphic" as being the work of their artists were imitations or copies of a picture painted by the plaintiff representing courtship. Lord Herschell, L.C., in delivering his speech in that case, after referring to the similarities and dissimilarities which led him to conclude that the defendants' sketches were not copies of the plaintiff's printing, concluded thus :

> " My Lords, it is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now before your Lordships. I have tried to indicate some of those which have led me to my conclusion ; but it depends really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it or at least of its design ".

In arriving at a conclusion different from that, to which Ramaswami, J., came, we find ourselves in a similar predicament being unable to put into words all the reasons for our conclusion, though we are certain that the effect produced upon our minds by a study of the two pictures is that the defendants' picture is a copy of the plaintiffs'. It follows that the appellants are entitled to the injunction asked for.

On the question of damages, the appellants claimed Rs. 2,000 on the basis that, prior to the introduction into the market of the defendants' picture, they were selling about 2,000 copies of their picture every year, though they did not indicate the margin of profit on the sale of each picture. However, the documents produced by them show that the sale fell down to 216 copies a year in 1952-53 after the defendants had introduced their picture in 1952. In the view he took on the main question of infringement of copyright, the learned Judge Ramaswami did not consider it necessary to discuss the evidence on the question of damages because he concluded

1. (1913) 29 T.L.R. 570.
2. L.R. (1895) A.C. 20.

that the plaintiffs-appellants were not entitled to any damages. It is unnecessary to call for a finding on this question because at the conclusion of the hearing of the appeal both sides agreed that in case we found for the plaintiffs on the question of infringement of copyright the damages to which the plaintiffs would be entitled should be Rs. 500. Accordingly we hold the plaintiffs are entitled to recover damages Rs. 500 from the defendants. It is not permissible for the plaintiffs-appellants to ask for an account of the profits made by the respondents, in addition to damages for infringement of copyright. In the result the appeal is allowed, the decree and judgment of Ramaswami, J., are set side and the appellants are given a decree for injunction in terms of clause (*a*) of paragraph 15 of the plaint, and also a decree for damages in the sum of Rs. 500 with interest at 6 per cent. per annum payable from this date till recovery. All other claims made in the plaint are refused.

The appellants will be entitled to get their costs incurred during the trial before Ramaswami, J., from the respondents. But there will be no order as to costs in the appeal.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

T. V. Sundaram Iyengar & Sons Ltd., Madurai .. *Applicant**

v.

The Commissioner of Income-Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 12-B—Applicability—' Capital gains '—When liable to tax.

In order to attract the operation of section 12-B of the Income-tax Act it is sufficient if the profits—capital gains—arose during the accounting year and they need not have been actually received. The word used in the section is ' arising ' and not ' receipt '. The liability to tax is on the profits which have arisen to an assessee by the sale of his capital asset. If it subsequently happens that the profit is not actually received that would be a ' capital loss ' arising in the year when the money became irrecoverable. To attract the tax under section 12-B it is sufficient if profits have arisen; *i.e.*, if the assessee has a right to receive the profits and it is not necessary that it should have been actually received.

Case referred to the High Court by the Income-Tax Appellate Tribunal, Madras, under section 66 (2) of the Indian Income-Tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), R. A. No. 72 of 1951-52 (I.T.A. No. 431/49-50, Assement Year 1947-48) on its file for decision on the following questions of law, *viz.*:

1. Whether the provisions of section 12-B of the Indian Income-tax Act levying a tax on capital gains are beyond the competence of the Central Legislature, under the Government of India Act, 1955 ?

2. Whether on the facts and in the circumstances of the case, there is material to support the assessment made on the petitioner on a sum of Rs. 1,16,598 as capital gains and whether such assessment is valid ?

M. Subbaraya Ayyar and *V. Sethuraman*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondent in both cases.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—In both these cases the facts are similar and the question for determination is the same. We shall therefore deal with both the cases together.

T. V. Sundaram Ayyangar & Sons Ltd., the assessee in R.C. No. 91 of 1953, is a Private Limited company carrying on business among other things in the purchase and sale of motor cars, spares and accessories. It also act as the managing agent of several allied transport companies. In November, 1945, the assessee had on hand 15 lorries, six taxis and four delivery vans. At that time there was before the business

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* C.R. Nos. 91 and 92 of 1953. 13th November, 1958. (22nd Kartika of 1880—Saka.)

world a scheme sponsored by the Central and State Governments to co-ordinate road and rail transport. In furtherance of this scheme a company called the Southern Roadways, Ltd., was floated. It was incorporated on 13th September, 1946 and it obtained the certificate of commencement of business on 15th September, 1946. The assessee was the Managing Agent of the Southern Roadways Ltd. In November, 1946, the assessee sold its entire fleet of 15 lorries, six taxis and four vans to the Southern Roadways Ltd., for a sum of Rs. 2,20,250. Subsequently, that is to say, on 18th December, 1946, the Southern Roadways Ltd., wrote to the assessee asking it to reduce the price to Rs. 1,92,834. This was done in view of the fact that the State Government at that stage proposed to nationalise road transport. By a letter, dated 17th January, 1947, the assessee agreed to this reduction. Subsequently the Government again changed their policy and as a consequence T. V. Sundaram Ayyangar & Sons, Ltd., agreed to accept Rs. 48,800 being the written down value of the vehicles, and, to accept this sum of Rs. 48,000 in the form of paid up shares in Southern Roadways Ltd. All this was in 1947, that is to say after the close of the account year of the assessee company which ended on 31st December, 1946.

In computing the total income of the assessee for the account year ended 31st December, 1946, the Income-tax Officer included a sum of Rs. 1,16,598 as capital gains under section 12-B of the Income-tax Act. How this figure was arrived at is explained in the assessment order made by the Income-tax Officer on 31st January, 1948. The assessee appealed to the Appellate Assistant Commissioner and contended that the Income-tax Officer was wrong in holding that the sum of Rs. 1,16,598 represented profits assessable to capital gains tax. The appeal failed. A further appeal to the Appellate Tribunal also failed. The assessee then came to this Court in C.M.P. No. 2884 of 1952 and obtained an order directing the Tribunal to state a case on the following points of law :

(1) Whether the provisions of section 12-B of the Indian Income-tax Act levying a tax on capital gains are beyond the competence of the Central Legislature under the Government of India Act, 1935, and

(2) Whether on the facts and circumstances of the case, there is material to support the assessment made on the petitioner on a sum of Rs. 1,16,598 as capital gains and whether such assessment is valid.

The assessee in R.C.No. 92 of 1953 is the P.S.S.Motor Service, Limited, Madurai a private limited company now under liquidation. It carried on the business of road transport in passengers and goods in the districts of Madurai and Ramanathapuram. This company had 22 buses with route rights which it conveyed to the Southern Roadways, Ltd., in October, 1946, for a sum of Rs. 3,06,500. Subsequently, on 18th December, 1946, P.S.S. Motor Service, Ltd., agreed to accept Rs. 2,22,085 as the price of its buses and route rights. In 1947 this company agreed to accept Rs. 78,000 in full satisfaction of the purchase price due to it in the form of fully paid up shares in the Southern Roadways, Ltd.

The account year of the company ended on 31st December, 1946. The Income-tax Officer included a sum of Rs. 1,44,109, as capital gains under section 12-B of the Income-tax Act in respect of the buses. How he obtained this figure is explained in the order he made on 31st January, 1948. This assessee also appealed against the levy of tax on this amount to the Appellate Assistant Commissioner and failed. The further appeal to the Income-tax Appellate Tribunal was also unsuccessful. The assessee then came to this Court in C.M.P. No. 2863 of 1952 and obtained an order directing the Tribunal to state the following questions of law for the decision of this Court :

(1) Whether the provisions of section 12-B of the Indian Income-tax Act levying a tax on capital gains are beyond the competence of the Central Legislature under the Government of India Act, 1935?

(2) Whether, on the facts and circumstances of the case, there is material to support the assessment made on the petitioner on a sum of Rs. 1,44,109 as capital gains and whether such assessment is valid?

By an order made on 25th February, 1957, this Court held on the first question thus :

"The first of these questions is concluded by the decision of the Supreme Court in *Navinchandra Mafatlal* v. *Commissioner of Income-tax*[1]. That question is answered in the negative and in favour of the department."

In view of certain other contentions which had been raised, this Court directed the Tribunal to submit a further statement of the case and give its findings as to the market value of the motor vehicles which had been transferred by T. V. Sundaram Ayyangar & Sons, Ltd., and P. S. S. Motor Service, Ltd., to the Southern Roadways Ltd. The Tribunal has accordingly submitted its findings and further statement.

The Tribunal found that the value of the assets transferred by T. V. Sundaram Ayyangar & Sons, Ltd., and P. S. S. Motor Service, Ltd., to the Southern Roadways Ltd., was respectively Rs. 1,84,750 and Rs. 2,32,050.

It will be noticed that these figures are higher than the corresponding figures adopted by the Income-tax Officer.

Under section 12-B of the Income-tax Act an assessee is liable to pay tax under the head " capital gains " in respect of any profits or gains, arising from the sale, exchange or transfer of a capital asset effected after the 31st March, 1946.

Mr. Subbaraya Ayyar, the learned Advocate for the assessee, first contended that there had been no sale at all in these two cases and that in consequence section 12-B did not apply. In respect of this contention, the very first observation we would make is that this point was not taken at any prior stage of these somewhat protracted proceedings. Besides, all the available evidence is against the contention. The vehicles and the route rights in the case of the buses admittedly belonged in one case to T. V. Sundaram Ayyangar & Sons, Ltd., and in the other to P. S. S. Motor Service, Ltd. All these have been transferred to the Southern Roadways, Ltd., which is an entirely different legal entity. The transfer was not gratuitous but for a price agreed on. It is difficult to see what more is required to make the transaction a sale. The argument, therefore, fails.

We have already stated that in 1947 the assessees agreed to accept in lieu of cash fully paid up shares in the Southern Roadways, Ltd., for amounts very much smaller than the price at which the assets had been sold. Basing himself on this fact Mr. Subbaraya Ayyar contended that it was open to the parties to a contract to vary it or substitute a fresh contract in its place. That is no doubt so, but we find it difficult to see how that argument would help the assessees now before us. In order that section 12-B of the Income-tax Act may apply, it is sufficient if in the relevant accounting year profits arise out of the sale of capital assets. What the parties did subsequent to the year will not have any bearing on their liability to tax in respect of that year.

Mr. Subbaraya Ayyar next argued that " capital gains " can be subject to tax only after the gains have been received, and that in the present case no profits were received because in 1947 the assessees agreed to accept paid-up shares in the Southern Roadways, Ltd., equivalent only to the written down or book value of the assets transferred. We are unable to find any support for this argument in the language of the Act. Section 12-B does not require that profits should have been actually received. It is sufficient if they have arisen. Throughout the Income-tax Act the words " accrue " and "arise" are used in contradistinction to the word " receive " and indicate a right to receive. This was explained by Fry, L.J., in *Colquhoun* v. *Brooks*[2]. The learned Judge observed:

"I think, therefore, that the words 'arising or accruing' are general words descriptive of a right to receive profits."

See also *Commissioner of Income-tax* v. *Anamallais Timber Trust Ltd.*[3] To attract the operation of section 12-B it is therefore sufficient if the profits arose. They need not have been actually received.

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1. (1955) S.C.J. 158: (1955) 1 M.L.J. 87: 26 I.T.R. 758.
2. (1888) L.R. 21 Q.B.D. 52 at 59.
3. (1950) I.T.R. 333.

In support of his argument Mr. Subbaraya Ayyar referred to *Seth Lalbhai* v. *Commissioner of Income-tax*[1], and *Karumuthu Thiagaraja Chettiar* v. *Commissioner of Income-tax*[2]. Neither of these cases is in point because they deal with the meaning of the word " receivable " in section 8 of the Indian Income-tax Act. In the former case it was held that there can be no mercantile method of accounting as far as section 8 is concerned. Interest on securities only becomes " income " when it is actually received and not when it is due or capable of being received by the assessee. Similarly it was held in the latter case,

"On the interest which accrues due in respect of securities, debentures, etc., referred to in section 8 of the Indian Income-tax Act, 1922, the liability to pay tax arises only when the interest is received."

Section 12-B, however, does not speak of any receipt at all. The crucial word used there is " arising ". Neither of these decisions, therefore, applies.

Section 12-B renders liable to tax the profits that have arisen to an assessee by the sale of his capital assets. There is no controversy here that the assets transferred by the assessees to the Southern Roadways, Ltd., constituted capital assets of the assessees. It is also not controverted that depreciation was allowed in respect of the vehicles in computing tax in the earlier years. One of the provisos to section 12-B indicates that where in respect of capital asset the assessee has obtained depreciation allowance in any year, the actual cost of the asset to the assessee shall be its written down value, subject to certain adjustments which are not of present interest. There is no allegation that the sale of the assets to the Southern Roadways Ltd., was effected with the object of avoiding or reducing the liability of the assessees to tax under section 12-B. Therefore, the proviso which directs that in such cases the profits arising to the assessees shall be determined with reference to the fair market value of the assets sold does not apply. The profits that have arisen have, therefore, to be ascertained by deducting the book value from the price at which the assets were sold. That price was first fixed in the case of T. V. Sundaram Ayyangar & Sons, Ltd., at Rs. 2,20,250, but, in the same year it was reduced to Rs. 1,92,834. Similarly in the case of P. S. S. Motor Service, Ltd., the price was first fixed at Rs. 3,06,500, but subsequently reduced in the same year to Rs. 2,22,085. There is no allegation that the price was to be paid at any future time, which means, that the price became payable forthwith, that is to say, in the relevant accounting year. The assessees, therefore, obtained the right to receive the price in that year. Their profits, therefore, arose in that year. As we tried to explain before, the section does not require that the profits should have been received. It is sufficient if they have arisen.

In this connection we would mention that the assessee maintained their books on a mercantile basis and showed the sale price of their assets as receipts. In this context the observations of the Privy Council in *Commissioner of Income-tax* v. *Kameshwar Singh*[3], are of interest. At page 101 their Lordships say :

" What the Officer is directed to compute is not the assessee's receipts but the assessee's income and *in dubio what the assessee himself chooses to treat as income may well be taken to* be income and to arise when he so chooses to treat it. (*See* per Lord Dunedin in delivering the judgment of the Board in *Commissioner of Taxes* v. *Melbourne Trust Ltd.*[4]. The sum which the officer has brought into account from the interest register in so far as consisting of allocations from sums received in previous years have never borne tax and in their Lordships' opinion *the assessee cannot complain if the officer agrees with the assessee in treating them as income of the year in which the assessee himself first thought fit so to regard them* ".

If it subsequently happens that the money is not actually received, that would be a capital loss arising in the year when the money became irrecoverable. Even if we suppose that the assessees found it difficult to receive in full price for which they transferred their assets to the Southern Roadways, Ltd., and, that in consequence they decided to accept paid up shares in the transferee company, that would be a capital loss which arose outside the accounting year, and therefore cannot be taken

1. (1952) 22 I.T.R. 13.
2. (1954) 1 M.L.J. 24 : 24 I.T.R. 593.
3. (1933) 64 M.L.J. 612 : L.R. 60 I.A. 146 : (1933) 1 I.T.R. 94.
4. L.R. (1914) A.C. 1001.

notice of for the relevant accounting year. As we said before, to attract liability to tax under section 12-B it is sufficient if profits have arisen, that is to say, if the assessee has a right to receive the profits. It is not necessary that the assessee should have actually received them. And undoubtedly the assessees had the right to receive the price and therefore the profits during the relevant accounting year.

The second of the questions referred to us, therefore, must be answered in the affirmative and against the assessees. The department will be entitled to its costs in both cases. Counsel's fee Rs. 250 only in R.C. No. 91 of 1953.

R.M. ——— *Reference answered against the assessse.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The Union of India, by the Divisional Engineer, Telegraphs, formerly of the Madras Division now bifurcated and in charge of the Tiruchirapalli Division .. *Petitioner**

v.

V. M. P. Swami .. *Respondent.*

Madras Buildings (Lease and Rent) Control Act (XXV of 1949), *section* 7 (2) (*b*) (iii) *and section* 13—*Using a building for different purpose—Building taken on lease for running an office—If could be used to instal a telephone repeater-station—G.O. Ms. No.* 2472 *(Development), dated* 14*th May,* 1948—*Exemption of buildings taken on lease by Central Government from section* 7 (2) *and* (3) *of the Act—Validity.*

The power of exemption granted under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, cannot be exercised in such a way as to bar a landlord from seeking his remedies against his tenant both under the ordinary law of Transfer of Property Act and under Rent Control Act. G.O. Ms. No. 2472 (Development), dated 14th May, 1948, which exempts buildings taken on lease by the Central Government from the provisions of section 7 (2) and (3) of the Act, and not under section 7 (1), leaving a landlord in a helpless state, is illegal and invalid and a landlord is entitled to maintain an eviction petition in such cases.

Govindaraja Mudaliar v. *State of Madras*, (1955) 1 M.L.J. 492, followed.

Where a building was taken on lease for running an office it cannot be used for installing heavey repeater machines with its accessories and cables and such a conversion will constitute a different user within the meaning of section 7 (2) (*b*) (iii) of the Act.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of South Arcot, dated 17th January, 1958 and made in C.M.P. No. 468 of 1957, preferred against the Order of the Court of the Subordinate Judge of Cuddalore in C.M.A. No. 6 of 1956 (H.R.C. No. 62 of 1954, Rent Controller, Tindivanam).

The Government Pleader (*B. V. Viswanatha Ayyar*), for Petitioner.

T. Venkatadri, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by the Union of India for revising and setting aside the order of the District Judge, South Arcot, in C.M. P. No. 468 of 1957, who had dismissed that revision petition and confirmed the order of eviction passed against the petitioner by the Appellate Authority, the Subordinate Judge of Cuddalore, who had reversed the order of the Rent Controller who had dismissed the eviction petition *in limine* as not maintainable in view of a Government Order.

The facts were briefly these : The petitioner took House No. 133, Hospital Road, Villupuram, from the landlord, Swami, the respondent herein, for running an office of the Telegraph Department. The original tenancy agreement was only to run the *Office*. But later on, the petitioner wanted to instal a telephone repeater-station in the premises. In spite of the objection of the respondent to the installa-

* C.R.P. No. 327 of 1958. 14th November, 1958. (23rd Kartika, 1880—Saka).

tion of that heavy machinery the repeater-station was installed in the premises, and this old house had several holes dug in the walls and floor for the installing the repeater-station and putting underground cables. There was also much virbration resultant on the installation of the repeater-station, and the respondent complained of serious damage to his *old building*. Finally, by his letter Exhibit B-1, dated 28th July, 1954, the respondent, who said that he wanted the building for his own use, added that *he expected at least a reasonable enhanced rent* because of the installation of the repeater and the putting of the house to a different and more wearing use, but left the enhanced rent to be fixed by the Divisional Engineer himself. The Divisional Engineer, however, replied that the holes made in the walls and floor would be closed when the department vacated the building, but that *no enhanced rent* would be paid, as demanded. This he intimated by his letter Exhibit B-3, dated 30th July, 1954.

The landlord then filed H.R.C. No. 62 of 1954, under sections 7 (2) (*b*) and 2 (iii) of the Madras Buildings (Lease and Rent) Control Act, for evicting the petitioner on various grounds, the principal of which were that the building was *not used for the purpose for which it was leased* but was being used for a different and unauthorised use, and that he wanted the building for his own occupation. The Union of India contested the petition vigorously, urging that under G.O. Misc. 2472 (Development), dated 14th May, 1948, buildings taken on lease by the Central Government were exempted from the operation of section 7 (2) and (3) of the Act, and, so, the petition for eviction was *not maintainable*. The Rent Controller agreed with this contention and dismissed the petition *in limine* without costs, and did not go into the merits.

The landlord took the matter in appeal. The Appellate Authority, the Subordinate Judge, Cuddalore, held that the petition, was *maintainable* because G. O. No.2472 dated 14th May, 1948, was illegal and *ultra vires*, as the exemption in it was a truncated one, injurious to the subject as it did not also cover section 7 (1) of the Act and it, therefore, illegally barred the remedy of the landlord to apply for eviction under the Transfer of Property Act, in addition to barring his remedy under the Rent Control Act. He relied on the ruling of Rajagopala Ayyangar, J., in *Govindaraja Mudaliar* v. *State of Madras*[1], in support of his view. Therefore, he held that the petition was maintainable, and going into the merits, held that as the building originally let out for purely office purposes had been unauthorisedly converted into other uses, like the installation of a repeater-machine and its accessories, digging holes in the walls and floor, and causing endless vibrations and damage to this old building, the tenant had rendered himself liable to be evicted, especially as the value and the utility of the building were likely to be impaired materially. So, he set aside the order of dismissal passed by the Rent Controller and directed the eviction of the petitioner, but granted two months' time to the petitioner for vacating the premises. He directed the petitioner to pay the landlord Rs. 25 as costs in the appeal, besides Rs. 25 as costs in the petition before the Controller.

The petitioner took the matter in revision to the District Judge, South Arcot. The learned District Judge, after discussing the matter once more, agreed with the view of the Appellate Authority regarding the maintainability and the merits and dismissed the Revision Petition with costs, including an advocate's fee of Rs. 25. The petitioner has thereupon filed this Revision Petition.

I have perused the records, and heard the learned Government Pleader, for the petitioner, and Mr. T. Venkatadri, the learned counsel for the landlord-respondent. The learned Government Pleader raised several contentions. The first was that G. O. No. 2472 was wrongly held by the Appellate Authority and the District Judge to be *ultra vires* and that the ruling of Rajagopala Ayyangar, J., in *Govindaraja Mudaliar* v. *State of Madras*[1], would have no application to the facts of this case as the exemption here was also under section 7 (3) though section 7 (1) was not covered by the exemption. I see no point in this. In my opinion, the above ruling of Rajagopala Ayyangar, J., will apply to this case also, as even here,

1. (1955) 1 M.L.J. 492.

the landlord's remedy under the Transfer of Property Act would be barred by the Government Order as the exemption is not also under section 7 (1). There is no power given to the Government to debar a person from taking advantage of the provisions of the Transfer of Property Act by such a truncated exemption and so, when this Government Order took away the remedy of the landlord under the Transfer of Property Act, in addition to barring his remedy under the Rent Control Act, it was doing an illegal thing. In that view, the Appellate Authority and the learned District Judge were both right in holding that the petition of the landlord was maintainable.

The next contention of the learned Government Pleader was that the installation of the repeater with its accessories would not be diversion of the original purpose for which the house was taken on rent, *viz.*, running an office there, to another purpose different from it and not agreed to by the landlord. I cannot agree. A mere *office* with no machine in it more terrible than a typewriter is quite different from what this house has been converted into with this heavy repeater-machine and its accessories, and cables and vibrations and consequent damage. Indeed, the officers of the department were well aware of it, and that is why they sought the landlord's permission and claimed to have got it, though really the correspondence shows that it was not got. The changed use of the building certainly would impair the value and the utility of the building to some extent. Even, if it did not do so, it would amount to using the building for purposes other than those for which it was leased out, and that would be sufficient to sustain the order of eviction, if the landlord's permission was not proved to have been given. Else, a man can rent out a house for locating his office and later on move his workshop and machinery into it.

The next contention of the learned Government Pleader was that the landlord had really *agreed* to the changed use of the building. He relied on Exhibit B-2, dated 26th July, 1954, wherein the Divisional Engineer says :

"In the personal discussion we had, *you stated, that you would have no objection* to installation of the equipment in the room occupied by the S.D.O.T. so long as no structural alterations were made."

The landlord stoutly denied the truth of this, and, in Exhibit B-1, dated 28th July, 1954, *wanted the rent to be substantially enhanced if he were to agree to the changed use of the building*. So, it was, at best, only *a conditional agreement*. In Exhibit B-3, dated 30th July, 1954, the Divisional Engineer says:

"I am very thankful to you to have agreed for the temporary installation of the carrier equipment. Your contention that the proposed installation was not contemplated in our tenancy agreement is not correct."

The inference is irresistible that the two were talking at cross-purposes. The landlord did not agree to the alteration unless the rent was substantially enhanced, and did contend that the proposed installation was not contemplated in the tenancy agreement. The Divisional Engineer took the *conditional consent of the landlord* to the installation, on payment of increased rent, to be an *unconditional agreement* to the installation. So, this argument too will not avail the learned Government Pleader. Of course, the landlord's courteously leaving the *quantum* of the enhancement of rent to the Divisional Engineer will not enable that officer *to refuse all enhancement of rent* and call it an exercise of his discretion.

Then the learned Government Pleader said that the petitioner was running an *essential service* in this building and so eviction should not have been ordered. I agree with the learned District Judge that a *Telegraph Office* will not be covered by the exemption. Nor will the *illegal* Government Order confer such exemption. The essential nature of the office may only justify grant of a reasonable time for removing the elaborate machinery installed in the premises to another building either rented out by the petitioner, or newly constructed by the petitioner, or for the purpose of taking acquisition proceedings regarding this very building if so advised. A second repeater-machine has been installed since the filing of the Civil Revision Petition according to Mr. Venkatadri increasing the vibration and the crack on the wall and the damage. Further installation is prevented in C.M. P. No. 4806 of 1958.

In the end, therefore, I confirm the order of eviction passed by the learned District Judge and the Appellate Authority and dismiss the Civil Revision Petition with costs.

Then the learned Government Pleader requested for the two years' time to vacate the premises, as there is elaborate machinery there, part of an essential service, and it has to be removed carefully to a suitable building to be rented out by the petitioner, or to be constructed by the petitioner, unless the petitioner decides to acquire the present building under the Land Acquisition Act, which also will take some considerable time. Mr. Venkàtadri strongly objected to the grant of any time in view of the delay which has already occurred, and the grant of three months time already, despite his objection, by the learned District Judge in I.A. No. 40 of 1958. He said the utmost time I should grant should be *three months* and that too on condition of the petitioner's paying enhanced rent as the building is being used for purposes other than those for which it was taken on lease and a lease for these purposes would fetch a higher rent. I consider that the just and reasonable order to pass, in the circumstances, is to give the petitioner, the Union of India, *one year's time from today* to vacate the premises for the reasons urged by the learned Government Pleader (public interests require it) subject to rent from today being paid by the petitioner *at the rate of Rs.* 150 *per month*, a against the present rent of Rs. 100 under the agreement. It is obvious that such *an extraordinary indulgence*, like granting time for *one year* in this already long-drawn-out case, must be saddled with stringent terms, especially when the building is continued to be put to a use different from the use for which it was taken on lease, in the face of the opposition of the landlord, who was agreeable to such different use only if substantially enhanced rent was paid. It is obvious also that when a building is put to an industrial or quasi-industrial use, a greater rent will be got. A *shop* will always fetch a greater rent than a *house*. So too, a building where a repeater machinery is installed than a house used as a mere office. A small plot leased out for a petrol-bunk will fetch ten times the normal rent. I feel no compunction in granting the extraordinary time of one year to the petitioner in view of the enhanced rent I am directing and the difficulty the petitioner will have to find a suitable building in that place to remove this complicated machinery so essential for the public. After all, the landlord's real cry in Exhibit B-1 was for enhanced rent. At the request of the Government Pleader, I make it clear that the Union of India need pay the enhanced rent at Rs. 150 per month from today, only till they vacate the premises. If they vacate the premises in six months or seven months from now, they need not pay any rent at all thereafter, much less the enhanceed rent, though they must vacate the premises within a year from today on pain of eviction proceedings being taken out by the landlord through Court.

Mr. Venkatadri urged that I should also provide for damages, especially as the petitioner has installed one more repeater and is trying to instal some unknown and mysterious machinery in this building for the Geophysical Year and that this machinery may blow up the building or cause it to fall down. The learned Government Pleader denied the reality of any such fear, and said that if such catastrophe happens, by any action of the petitioner, the landlord will, of course, have his remedy under the ordinary law to claim damages but that if this old building falls down *from sheer old age*, like an old man dying, or from earthquake, flood or other cause beyond the petitioner's control, the landlord will not get any damages. I need not discuss this question further, as it is not very germane to this petition, and the diabolical instruments apprehended by the landlord as likely to be installed have not so far been installed in that building, and cannot be installed hereafter in view of my order in C.M.P. No. 4806 of 1958.

R.M. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

T. Shanmugam (Kandan Touring Talkies), Kveripakkam, N. Arcot District .. *Appellant**

v.

M. Arumugam, Proprietor, Prabhat Talkies, Kaveripakkam and others .. *Respondents.*

Madras Cinemas (Regulation) Act (IX of 1955), *section* 5, *rules* 14 *and* 36—*Application for the grant of no-objection certificate to locate touring cinema—Scope of the proceedings—Grant of licence—Principles of selection —Not applicable.*

There is nothing in the provisions of the Madras Cinemas (Regulation) Act or in the rules which make it incumbent on the Collector to take into consideration any representation of a competing applicant for the grant of a ' no-objection ' certificate to locate a touring cinema.

The only question which the Board of Revenue was called upon to decide in the appeal preferred against the order of the Collector refusing to issue a ' no-objection certificate ' was the question of the suitability of the site, whether the reason assigned by the Collector was a valid one for rejecting the application. *Prima facie* there could be no other party interested directly in the result of the appeal. The order of the Board allowing the appellant's appeal cannot be set aside on the mere ground that the respondent had not been given notice to enable him to uphold the order of the Collector.

The consideration of the comparative estimate of the qualifications of the appellant and the respondent in the appeal preferred to the Board would be enlarging the scope of the appellant's appeal unwarranted by any provision of the Act or any rule or any general principles of law.

There is nothing in the Act or in the rules framed thereunder which casts a duty on the Collector or the Board of Revenue to make a selection among several applicants.

If the scheme and the procedure laid down in the Act and the rules corresponded to the scheme and procedure found in the Motor Vehicles Act and the rules framed thereunder there would be justification for invoking the principle of selection.

Under Rule 14 of the Act there is no restriction to the grant of licence to permanent and touring cinemas on the basis of the population in any place except towns with a population of fifty thousand and above, in which no touring cinemas will be allowed if there are three or more permanent cinemas. There is no prescribed site for the location of a touring cinema. There is no date within which application should be made for the grant of a ' C ' licence or the grant of a no-objection certificate, say with reference to a particular year. There is no provision for the publication of applications for no-objection certificates and no opportunity is given to other applicants to make representations. There is no duty cast on the Collector to fix a date to consider the several representations made on behalf of and against the several applicants.

Case-law discussed.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopalan, dated 3rd November, 1958 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 754 of 1958 presented under Article 226 of the Constitution, to issue a writ of *certiorari* calling for the records connected with the order of the Board of Revenue, Madras, made in B.P. RT. No. 324 of 1958, dated 23rd January, 1958 and quash the said order.

R. M. Seshadri, for Appellant.

S. Mohan Kumaramangalam for *K. V. Sankaran*, for the 1st Respondent.

G. Ramanujam, for the Additional Government Pleader (*K. Veeraswami*) on behalf of the Respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the judgment of Rajagopalan, J., in Writ Petition No. 754 of 1958. The dispute is between two proprietors of touring cinemas. The appellant, T. Shanmugam, is the proprietor of Kandan Touring Talkies. The contesting respondent Mr. M. Arumugam, who will be referred to in

* W.A. No. 98 of 1958. 24th December, 1958. (3rd Pausa of Saka 1880.)

this judgment as the respondent, is the proprietor of Prabhat Talkies. Each of them wanted to run a tourning cinema in Kaveripakkam village in the district of North Arcot. To follow the facts and the contentions of the contesting parties it is necessary to refer to the material provisions of the Madras Cinemas (Regulation) Act, IX of 1955 and the rules made thereunder. Under section 3 of the Act, no person ordinarily shall give an exhibition by means of a cinematograph elsewhere than in compliance with any conditions and restrictions imposed by such licence. The licensing authority is the District Collector, though the Government may by notification appoint some other authority. Section 5 (1) specifies the matters to which the licensing authority shall have regard in deciding whether to grant or refuse a license. They are the following

(*a*) The interest of the public generally ;

(*b*) the status and previous experience of the applicant ;

(*c*) the suitability of the place where the cinematograph exhibitions are proposed to be given ;

(*d*) the adequacy of existing places for the exhibition of cinematograph films in the locality ;

(*e*) the benefit to any particular locality or localities to be afforded by the opening of a new place of cinematograph exhibition ;

(*f*) the possession by the applicant, of other places if any licensed under this Act, whether at the time of applying for the licence or at any previous time ;

The licensing authority is also required to take into consideration any representations made by persons already giving cinematograph exhibition in or near the proposed locality or by any local authority or police authority within whose jurisdiction the place proposed to be licensed is situated or by any association interested in the giving of cinematograph exhibitions. Section 5-A which was inserted by an amending Act (Act XXI of 1956) provides that

" (*a*) to use any place for the exhibition of cinematograph films, or

(*b*) to use any site for constructing a building thereon for the exhibition of cinematograph films or

(*c*) to construct or reconstruct any building for such exhibition, or .

(*d*) to instal any machinery in any place where cinematograph exhibitions are proposed to be given,

a person shall make an application in writing to the licensing authority for permission therefor together with such particulars as may be prescribed."

(2) The licensing authority shall thereupon, after consulting such authority or officer as may be prescribed, grant or refuse permission and the provisions of sections 5, 8 and 9 relating to licences shall, so far as may be, apply to permission under this section ".

The following are the material rules :

" *Rule* 14 (1).—There shall be no restriction to the grant of licences to permanent and touring cinemas on the basis of population in any place, except towns with a population of 50,000 and above in which no touring cinemas will be allowed, if there are three or more permanent cinemas.

(2) The restrictions in respect of distance between cinemas shall be as specified below :

Touring cinema in any place shall not be allowed within a distance of one mile of the nearest permanent cinema located in the same local area in or in the adjacent village, panchayat or town in the City of Madras. ' Local area ' for this purpose means the area within the jurisdiction of a municipal council or a panchayat board or a revenue village.

The distance between any two touring cinemas shall be not less than half a mile.

There shall be no restriction in regard to the distance between one permanent cinema and another permanent cinema.

Rule 35 (1).—A person who intends to build a permanent cinema building shall furnish the licensing authority with information in respect of items (*a*) to (*f*) of section 5 (1) of the Act and other relevant particulars required in Form A. The application shall be accompanied by a plan of the proposed site drawn to scale and shall clearly indicate the surrounding road and buildings which exist up to a distance of 200 yards of the proposed site, schools, hospitals, temples or other places being clearly indicated.

(2) A copy of the application in Form A referred to in rule 35 (1) shall be sent to the local authority who shall forward it, within one month from the date of receipt of application from the applicant, to the licensing authority with its remarks recording its objections, if any, to the site and to the installation of machinery.

(3) A copy of the application shall also be sent to the Deputy Commissioner of Police, Traffic and Licensing, Madras, or the District Superintendent of Police in the mufassal, who shall remit it within one month from the date of receipt of application from the applicant, to the licensing authority with objections, if any, from the traffic point of view.

36. After consideration of the application with reference to the matters specified in section 5 (1) of the Act, and the objections of the local authority or the Police, the licensing authority shall grant a no-objection certificate in Form 'B' or may refuse to grant the same, within two weeks after the receipt of the remarks of the local authority and the police or within one month, if the licensing authority has to get any further report.

Note.—Any applicant aggrieved by the orders of the licensing authortity refusing to grant a "No-objection certificate" may appeal to the Board of Revenue. The rules in Part III shall apply to such appeals."

Part VII of the rules specially deals with travelling cinemas. Rule 99 (*b*) defines "travelling cinema" as

" (i) an outfit comprising the cinema apparatus and plant and the enclosure taken from place to place in the State of Madras for giving cinema exhibitions ; or

(ii) an outfit comprising cinema apparatus and plant taken from place to place in the State of Madras for conducting shows in the local theatre or halls."

Rule 100 provides that a person who intends to build a travelling cinema building shall follow the procedure in rule 35. Rule 106 says :

" On receipt of the application made under rule 100 the licensing authority shall grant a no-objection certificate in Form 'B' or may refuse to grant the same. He shall also issue an order approving or not approving the plan of the building to be constructed in the approved site within two weeks after the date of receipt of the application from the applicant.

Note.—Any applicant aggrieved by the orders of the licensing authority refusing to grant a 'No-objection Certificate' may appeal to the Board of Revenue."

The rules in Part III shall apply to such appeals. On completion of the building according to the approved plan, the applicant shall submit his application for licence to the licensing authority (Rule 107). The licensing authority, under rule 108, may issue to the applicant a licence in Form 'C' or refuse to issue such licence. Rule 110 relates to the grant of temporary licences. The form of the 'No-objection certificate' is as follows :

" In exercise of the powers conferred by rule 36 in Part II of the Madras Cinemas (Regulation) Rules, 1957, I................Collector/Commissioner of Police do hereby grant this certificte that there is no objection to Sri............, son of...........resident of village ....taluk ...., district....locating a permanent/touring cinema in the land belonging to Sri...... ....at village............taluk............district........

The site where the cinema is to be located is specified below :—"

On 31st May, 1957, the appellant, T. Shanmugam, made an application to the Collector of North Arcot for the grant of a no-objection certificate for the location of a touring cinema in S. No. 171/2-A of Kondapuram village. The application was refused by the Collector who passed the following order on 6th December, 1957 :

"The Application of Sri T. Shanmugham of Kaveripakkam for locating a Cinema in S. No. 171/2-A of Kondapuram Village is refused as the site in question being nearer to a post-motem shed and is reported to be not suitable from the Public Health point of view ".

The respondent filed an application for a no-objection certificate on 25th July, 1957. The site on which he proposed to locate the cinema was S. No. 1316/2 in the village of Kaveripakkam. It is common ground that the distance between this site and the site for which the appellant had applied for a certificate is less than four furlongs. On 10th December, 1957, the Collector approved of the site proposed by the Respondent and directed the grant of a no-objection certificate to him ; but admittedly the grant was subject to the condition that the certificate was liable to be cancelled if it became unworkable by the order of the appellate authority. The implication was this. If the appellant succeeded in the appeal which he might pre_

fer to the Board of Revenue against the order of the Collector rejecting his application and consequently a no-objection certificate was granted to him, the respondent could not obtain a similar certificate in respect of the site selected by him because of the rule which imposes a restriction that the distance between any two touring cinemas shall be not less than half a mile (Rule 14 (2)). The appellant preferred an appeal to the Board of Revenue on 10th December, 1957. By its order, dated 23d January, 1958, the Board of Revenue allowed the appeal and directed the Collector to issue a no objection certificate to the appellant. Obviously the only matter for the consideration of the Board was whether the ground on which the appellant's application was rejected by the Collector was valid, and the Board considered that it was not. During the pendency of the appellant's appeal to the Board of Revenue, the Respondent applied to the Collector for the grant of a licence in Form 'C' for locating the touring cinema in the site for which he had obtained a no-objection certificate. On 3rd February, 1958, the Collector passed an order granting a 'C' licence to the respondent purely as a temporary measure, valid for a month or till such earlier time as the appellant's application for a no-objection certificate is sanctioned and the case becomes ready for the grant of a licence in Form 'C'. The appellant preferred an appeal to the Board against this order and obtained an *ex parte* interim stay of its operation. On 5th February, 1958, the Collector suspended the temporary licence granted to the respondent in view of the order of stay passed by the Board of Revenue. The Respondent thereupon applied to this Court under Article 226 of the Constitution (Writ Petition No. 94 of 1958) for the issue of a writ of *certiorari* to quash the order of the Collector, dated 5th February, 1958. The application was dismissed on the ground that the Respondent could move the Board of Revenue itself to vacate the interim stay. He thereupon applied to the Board and prayed for vacation of the interim stay. On 14th February, 1958, the Board vacated the interim stay. The appeal which had been preferred by the appellant against the order of the Collector, dated 3rd February, 1958, was disposed of by the Board by its order, dated 1st March, 1958. The Board allowed the appeal in part and directed the Collector to issue a no-objection certificate to the appellant and then consider his application for a 'C' licence as soon as he came with such an application. The respondent was permitted to run his shows for one month from the date of the Collector's order or till such earlier time as the appellant's application for the no-objection certificate was sanctioned and the case became ready for the grant of a licence in Form 'C'. In the course of their order the Board observed as follows :

"It was unfortunate that when the appeal relating to 'No-objection certificate' of the present appellant (Sri Shanmugam) was before the Board the Collector did not report that the respondent was also in the field. It is seen from the records that there were three applicants for the grant of a 'No-objection certificate' for a touring cinema all within the four furlongs limit in the local Panchayat area of Kaveripakkam. One of the applicants seems to have withdrawn his application and the Collector seems to have considered the case of the appellant and the respondent separately for the grant of a 'No-objection certificate'. When the appellant appealed against the Collector's orders the Board called for a report from the Collector. The Collector failed to submit the papers of the other applicant, *viz.*, the present respondent but reported only on the points urged in the appeal petition of the present appellant. There was no mention in the Collector's report about the application of the respondent but it is seen from the Collector's letter that on 10th December, 1957, the respondent was granted a 'No-objection certificate' which was liable for cancellation if the order became unworkable by the order of the appellate authority. This shows that the Collector was aware that the appellant would appeal to the Board and that some orders were due on it".

In pursuance of this order the Collector by his order, dated 6th March, 1958, granted a no-objection certificate to the appellant and directed the cancellation of the temporary licence which had been granted to the respondent on 3rd February, 1958. The respondent applied to the Collector ro review this order ; but his application was refused by the Collector on 11th March, 1958. The respondent thereupon appealed to the Board ; but that appeal was dismissed by the Board by its order, dated 25th March, 1958, in which they said :

"The present appellant (respondent herein) took out a "No-objection certificate" with the specific conditions attached to it that it will be liable for cancellation if it became unworkable as a result of the orders of the appellate authority on the appeal of the respondent (appellant herein) which was then pending before the Board. Again the 'C' licence given to the appellant was also a tem-

porary one and for one month and was hedged in by conditions similar to the above so that the appellant can have no cause to complain if in pursuance of the Board's orders the Collector cancelled the 'C' licence. The 'No-objection certificate' of the appellant has become unworkable and stands cancelled. Therefore, there is no need to go into the comparative merits of the appellant and respondent at this stage".

The respondent then filed a petition under Article 226 of the Constitution (Writ Petition No. 256 of 1958) on 27th March, 1958, for the issue of a writ of *certiorari* or other appropriate writ to quash the orders of the Collector, dated 5th March, and 11th March, 1958 and the further order of the Board of Revenue, dated 25th March, 1958, passed in pursuance of the prior orders, dated 23rd January, 1958 and 1st March, 1958. When this petition had been heard in part, the respondent filed another petition, Writ Petition No. 754 of 1958, for the issue of a writ of *certiorari* to quash the order of the Board, dated 23rd January, 1958, by which the Board allowed the appeal preferred by the appellant against the first order of the Collector for a no-objection certificate. Both the writ petitions were heard together and disposed of by a common order by Rajagopalan, J. The learned Judge dismissed Writ Petition No. 256 of 1958 and allowed Writ Petition No. 754 of 1958. The effect of the learned Judge's judgment is that the appeal preferred by the appellant against the order of the Collector, dated 6th December, 1957, rejecting his application for a no-objection certificate must be deemed to be pending and has to be disposed of afresh. The ground on which the learned Judge quashed the order of the Collector,dated 6th December, 1957, was that the respondent had not been given an opportunity to oppose the appeal, and, therefore, the principles of natural justice had been violated. The learned Judge further indicated that the respondent would be entitled, in opposing the appellant's appeal, to represent to the Board that even if the site selected by the appellant was unobjectionable, there should be a selection between the two applicants, that is, the appellant and the respondent, either by the Collector or by the Board. The above appeal is against this order of Rajagopalan, J., in so far as he allowed Writ Petition No. 754 of 1958.

The main question in this appeal is whether the learned Judge was justified in quashing the order of the Board of Revenue, dated 23rd January, 1958, allowing the appeal of the appellant before us, preferred against the order of the Collector rejecting his application for the issue of a no-objection certificate. So far as we are able to gather from the judgment of the learned Judge, the ground on which he set aside that order is that the order had been passed without notice to the respondent and, therefore, there was a violation of the principles of natural justice. Presumably the principle violated is that no order can be passed to the prejudice of a party without giving him an opportunity to be heard. The reasoning appears to be this. Besides the application of the appellant there was another similar application by the respondent for the grant of a no-objection certificate in respect of a site within four furlongs of the site selected by the appellant. A certificate had been granted to the respondent subject to the condition that it was liable to be cancelled if it became unworkable by the order of the appellate authority, that is to say, if the Board of Revenue allowed the appeal and held that the appellant was entitled to a certificate, then, the respondent could not obtain a certificate because of the proximity of his site to the appellant's site. The respondent was therefore interested in upholding the order of the Collector. If this be the only ground, with respect to the learned Judge, we think it does not justify the learned Judge's order quashing the proceedings of the Board of Revenue. The appellant made an application for a no-objection certificate and so far as we are able to see, there is nothing in the provsions of the Act or in the rules which makes it incumbent on the Collector to take into consideration any representation of a competing applicant. The Collector, therefore, was right in disposing of the appellant's application on its merits and on the footing that the appellant was the only person interested. The Collector refused to grant a no-objection certificate because he thought that the site selected by the appellant was not suitable on account of the existence of a post-mortem shed in the vicinity. The appellant aggrieved by that order appealed to the Board of Revenue as he was entitled to appeal. The only question which the Board was called upon to decide in the appeal was the

question of the suitability of the site, whether the reason assigned by the Collector was a valid reason for rejecting the appellant's application. *Prima facie* there could be no other party interested directly in the result of the appeal. It is true that the application of the respondent was liable to be rejected in case the appeal was allowed and the appellant was granted a no-objection certificate. But equally it may be said that the effect of the order of the Board allowing the appeal would be to prevent every other intending applicant for a site within four furlongs distance from the appellant's site. Suppose in this very case, pending the appeal, another application had been made for the issue of a no-objection certificate in respect of another site within the prohibited distance, does that applicant also have to be given notice ? Logically he should be; because his application would be liable to be rejected if the appellant's appeal were allowed. In our opinion the order of the Board, dated 23rd January, 1958, allowing the appellant's appeal cannot be set aside on the mere ground that the respondent had not been given notice to enable him to uphold the order of the Collector.

The matter, however, does not rest here. It is clear from the judgment of the learned Judge taken as a whole, that there was another more important reason for setting aside the said order of the Board. The learned Judge's judgment opens with the following statements :

> " Under the provisions of the Madras Cinemas (Regulation) Act IX of 1955 and the Rules framed thereunder only one touring cinema could apparently be located within the limits of Kaveripakkam village in North Arcot District ".

We are not aware what provision of the Act and what rule or rules the learned Judge had in mind. Before us it was admitted by counsel on both sides that there was no restriction whatever on the number of touring cinemas which could be located within the limits of the village. The learned Judge, however, is right when he observed thereafter that as the sites selected by the appellant and the respondent were within four furlongs of each other, only one person could get the certificate. But then the learned Judge made another assumption thus :

> "Unfortunately, however, the authorities failed to keep in view this feature of the case, that a selection would have to be made among the two applicants for the issue of the preliminary certificate in Form B, if the sites of both were acceptable."

It looks as if that this assumption is the real basis of the learned Judge's judgment. Later on in the judgment occurs the following pasage :

> " From what I have set out above it is clear that at no stage did the Collector or the Board consider the question, whether there should be a selection as between the petitioner and the third respondent for the location of the one possible touring cinema in Kaveripakkam ".

It is because of this assumption that the learned Judge indicated what could be urged by the respondent in the appeal of the appellant to the Board which had been disposed of by the order dated 23rd January, 1958 and which by reason of the learned Judge's order stood restored. He said :

> " In deciding whether that appeal should be allowed, with the consequence that the B certificate granted to the petitioner would stand cancelled, the petitioner should be allowed an opportunity to maintain the B certificate granted to him. It should be open to the petitioner to represent to the Board that, even if the site selected by the third respondent was unobjectionable, the factor of selection had to be considered either by the Collector or by the Board before the appeal of the third respondent was allowed, with the consequences I have indicated above ".

With very great respect to the learned Judge, this would be enlarging the scope of the appellant's appeal to the Board, unwarranted by any provision of the Act or any rule or any general principle of law. The appeal by the appellant raised one and only one question, namely, whether the reason assigned by the Collector for rejecting the appellant's application was valid or not. Even if the respondent was entitled to be heard in the appeal, he could be heard only on the one point raised in the appeal. Probably he might be given an opportunity to uphold the Collector's order by convincing the Board that the Collector's reason was proper and valid. The Collector had not dealt with the application of the appellant on a comparative estimate of the qualifications of the appellant and the respondent. There was no material relating to this

to be found in the order of the Collector. How then can the Board disposing of an appeal from the Collector deal with a question in respect of which there was no material in the order of the Collector? That is why the learned Judge obviously aware of this difficulty, said that it would be open to the respondent to represent to the Board that the factor of selection had to be considered either by the Collector or by the Board. This is the result of unduly enlarging the scope of the appellant's appeal.

There still remains the larger question whether there is anything in the Act or the Rules which compels the Collector or the Board to make a selection, and if there is, what are the circumstances in which the principle of selection has to be applied, what are its limits? Is there any fixed point of time with reference to which this principle of selection has to be applied? What we mean is this : Meanwhile suppose in this very case, pending the writ petitions and appeal, there had been five or six other applications for the grant of no-objection certificates. In view of the learned Judge's order it must be deemed as if no one has been finally granted a no-objection certificate. Will all those applicants be also entitled to be heard in the appellant's appeal which has been now reopened? We do not see any justice or equity or logic in denying them that opportunity if the principle to be followed is selection of one out of several candidates. In this very case though the appellant had made the application on 31st May, 1957, his application was actually disposed of only on 6th December, 1957, after an unconscionable delay for which we are unable to find any proper explanation on record. It is because of the long pendency of the appellant's application that the respondent could make another appliction. It follows that the invocation of the principle of selection will also depend on the pendency of the first application. Undoubtedly if the scheme and the procedure laid down in the Act and the rules corresponded to the scheme and procedure found in the Motor Vehicles Act and the rules framed thereunder, there would be justification for invoking the principle of selection. Under the Motor Vehicles Act, the Regional Transport Authority may limit the number of stage carriages for which stage carriage permits can be granted in the region or in any specified area or in any specified route within the rigion. Under section 57 (2) an application for a stage carriage permit shall be made not less than six weeks before the date on which it is desired that the permit shall take effect, or if the Regional Transport Authority appoints dates for receipt of such applications, on such dates. If it is an old route for which there is already in force a stage carriage permit which is due to expire on a particular date, the last date for renewal or for a new application is fixed. If it is a new route, the Regional Transport Authority notifies the last date for the receipt of applications. On receipt of applications, the Regional Transport Authority makes the applications available for inspection, publishes the applications or the substance thereof in the prescribed manner, together with a notice of the date before which representations in connection therewith may be submitted, and the date on which, and the time and place at which the applications and any representations received will be considered. When any respentation is made, the Regional Transport Authority is bound to dispose of the application at a public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative. All these provisions enable several applications to be made in respect of a particular route on or before a fixed date and opportunity is given to each applicant to make representations not only in support of his application but also against the applications of other applicants. It is obvious that this scheme inevitably attracts the principle of selection. The route is fixed and the number of permits which would be granted is also fixed. There are several applicants who have all filed applications before a particular date. Section 57 (4) prohibits any representation which is not made before the appointed date. It also enjoins on the person making the representation to furnish a copy of the representation to the applicant. On the other hand, under the Madras Cinemas (Regulation) Act, rule 14 in terms declares that there shall be no restriction to the grant of licence to permanent and touring cinemas on the basis of population in any place except towns with a population of fifty thousand and

above, in which no touring cinemas will be allowed if there are three or more permanent cinemas. There is no prescribed site for the location of a touring cinema. There is no date within which application should be made for the grant of a 'C' licence or the grant of a no-objection certificate, say with reference to a particular year. There is no provision for the publication of applications for no-objection certificates and no opportunity is given to other applicants to make representations. There is no duty cast on the Collector to fix a date to consider the several representations made on behalf of and against the several applicants. In a recent decision of a Division Bench in *Umapathi* v. *Panchaksharam Pillai*[1] (to which one of us was party) it was pointed out that the Motor Vehicles Act cannot be deemed to be an Act analogous to the Cinematograph Act. Though that case related to a temporary cinema licence, the following observations are apposite to the case before us :—

> "There (under the Motor Vehicles Act) there is a notification calling for applications. Here (under the Cinematograph Act) there is no notification calling for applications. Every person desirous of getting a temporary cinema licence can apply privately to the Collector, like an applicant for a gun licence. So, the two cannot be compared. Nor can a person be aware of an application of another for a temporary cinema licence as in the case of an application for a bus permit since there is no public notification but only private information".

There are several difficulties in invoking the principle of selection in respect of applications for the issue of no-objection certificates under the Madras Cinemas (Regulation) Act. Suppose *A* applies for a no-objection certificate and secures it from the Collector. A few days later *B* applies and his application is rejected on the ground that the site selected by him is within four furlongs of *A*'s site. *B* appeals to the Board of Revenue. Can he in his appeal make *A* a party and call upon the Board to make a selection between him and *A*, or ask for a remand of both the applications to the Collector for a comparison and selection ? There is also another aspect. Suppose *A* and *B* apply for no-objection certificates in respect of two sites which are not within the prohibited distance. Has the Collector even then to make a selection ? So far as we see, there is nothing to prevent the Collector granting no-objection certificates to both. We mention this circumstance because in the very case before us, if the respondent had chosen a site five furlongs away from the site selected by the appellant, the very ground on which Rajagopalan, J., considered that a selection should be made, namely that only one of the two could be granted a no-objection certificate, would disappear. In such a case it is not unreasonable to reject the application of the respondent who applied later, giving him liberty to file another application for a site which is not within the prohibited distance.

There may be an extraordinary contingency of two applications for the issue of no-objection certificates made by two persons on the same date for sites which lie within the prohibited distance from each other. In such a case it may be that the Collector will make a selection, or he may send for both the applicants and ask them to modify their applications in respect of the situation of the sites. But we are unable to find anything in the Madras Cinemas (Regulation) Act or in the rules framed thereunder which casts a duty on the Collector or the Board of Revenue to make a selection among several applicants.

Mr. Mohan Kumaramangalam drew our attention to certain decisions of this Court in which the principle of selection was adopted, though he very fairly conceded that in none of the decisions there was a consideration of the question whether such a principle was or was not warranted by the provisions of the Act and the rules. We shall briefly refer to them.

Muthukumaran v. *Murugan Touring Talkies*[2], related to a period when persons desirous of running cinemas had to obtain licences both under the Places of Public

1. Writ Appeal No. 110 of 1957 *Since reported in* (1958) 1 M.L.J. 352: (1958) M.L.J. (Crl.) 397.

2. W.P. Nos. 118 and 281 of 1957.

Resort Act and the Madras Cinemas (Regulation) Act. There were two applicants. One of them applied on 26th October, 1956, for the issue of a licence under the Places of Public Resort Act. The other applied on 13th December, 1956. There was a G.O. in 1954 embodying directions to the licensing authorities acting under the Places of Public Resort Act. The Government laid down general rules for determining the question of priority. The obvious implication was that applications should be diposed of on a consideration of priority of an application. It was common ground that only one touring cinema could be granted a licence in the village. The two persons also made applications under the Madras Cinemas (Regulation) Act for the grant of licence. Rajagopalan, J., thus dealt with the facts :—

" As I said, it was common ground that a licence under Act IX of 1955 could be issued only for one touring cinema in Kulithalai. There were two applicants for that licence, the petitioner and the second respondent. A selection had to be made by the licensing auhority, the Collector. The only ground on which the Collector preferred the second respondent to the petitioner for the grant of the licence was that the second respondent's application for the licence under the Places of Public Resort Act was prior in point of time.

The learned counsel for the petitioner submitted that the rule of priority laid down by the Government in G.O. 1634 dated 15th June, 1954, did not in terms apply to the grant of a licence under Act IX of 1955. It applies only to grant of a licence under the Places of Public Resort Act. The learned counsel contended further that the rule of priority laid down in G.O. No. 1634 of 1954 was really an irrelevant factor in deciding between two applicants to whom the "A" licence should be granted under the provisions of Act IX of 1955. The Collector certainly appears to have misconceived the scope of G.O. 1634. It was certainly not an order or direction issued by the Government under section 5 (4) of Act IX of 1955.

It was common ground that no specific directions or orders had been issued by the Government under section 5 (4) of Act IX of 1955 to provide any basis for a selection between rival applicants for the grant of " A " licence, where only one such licence could be issued for giving cinema shows in a given town or village. Nor did the Act itself specifically provide for selection, should it become necessary. The learned counsel for the petitioner was, in my opinion, well founded in his contention that in the absence of any specific statutory provisions or any specific directions issued by the competent authority under section 5 (4) of the Act, the licensing authority was bound to select the applicant with reference to the factors enumerated in section 5 (1) of the Act."

The learned Judge then pointed out that the factors mentioned in section 5 were not exhaustive. The learned Judge set aside the orders of the licensing authority on the ground that he had failed to take into account all the relevant factors in deciding who as between the two applicants should be selected for the grant of the ' A ' licence and directed that the two applications may be disposed of afresh.

In Writ petition No. 920 of 1957, Rajagopala Ayyangar, J., had to deal with a case which arose under the Madras Cinemas (Regulation) Act, 1955. There were two applications pending before the Collector for the grant of no-objection certificates. The two sites selected by the two applicants were within the prohibited half-mile distance. The District Collector granted a certificate to *D* and therefore rejected the application of the other applicant, *S*. *S* filed an appeal to the Board of Revenue. The Board issued notice to *D* and heard him and passed an order allowing the appeal by *S*. As a result thereof, the no-objection certificate granted to *D* was set aside. The order of the Board was challenged in a petition under Article 226. One objection taken was that the Board should not have examined the relative merits of the two applicants. Rajagopala Ayyangar, J., overruled the objection on the ground that the principles underlying the provisions of section 5 of the Madras Cinemas (Regulation) Act would also govern the disposal of applications for no-objection certificates and that under section 5 there would have to be a selection among the rival applicants. The learned Judge did not discuss the difficulties and the anomalies that would result if the principle of selection were to be followed in regard to applications under the Madras Cinemas (Regulation) Act on the analogy of applications for permits under the Motor Vehicles Act.

Two decisions of a Division Bench of which one of us was a party were brought to our notice by Mr. Kumaramangalam in Writ Appeals Nos. 14 and 17 of 1958. In neither case was there any point raised that the principle of selection should not

be applied. It was assumed that one of two applicants had to be selected for the grant of a no-objection certificate. It was common ground that it was the duty of the Collector and the Board of Revenue to examine the relative merits and qualifications of the two applicants. No assistance can be derived from these two decisions.

In our opinion, there was no valid ground on which the order of the Board of Revenue, dated 23rd January, 1958, could be quashed in exercise of the powers of this Court under Article 226 of the Constitution. The appeal is allowed and Writ Petition No. 754 of 1958 is dismissed. There will be no order as to costs throughout.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Devichand Jestimall and Co., Bangalore and others .. *Petitioners**

v.

The Collector of Central Excise, Madras .. *Respondent.*

Sea Customs Act (VIII of 1878), section 167 and Schedule, Item 8—Scope of.

To bring a person within the penal provisions of Item 8 of the Schedule to section 167 of the Sea Customs Act it is necessary to ascertain either that he imported the gold or was connected in the import of the gold. That is either he should have arranged for the import or abetted the same or received the same immediately after the import. To be in possession of gold or to buy or sell the same after the process of importation is complete even assuming that such importation is unlawful and independently of the series of acts connected with such importation will not fall within the terms of the aforesaid provision.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein in each of the petitions and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the Order in D.A. Dis. No. VIII/10/259/57 (Cus. Adj.) dated 12th December, 1958, on the file of the Collector of Central Excise, Madras, the Respondent in all the petitions in so far as the petitioner in each of the petitions is concerned and quash the said order.

D. R. Venkatesa Iyer, R. Rangachariar, K. Rajah Iyer and *S. K. L. Ratan*, for Petitioners.

The Government Pleader (*B. V. Viswanatha Iyer*) for the Respondent.

The Court made the following

ORDER.—On receipt of certain information the Superintendent of Central Excise, Vellore, searched the shop and residence of Messrs. Vanechand & Sons on 9th November, 1957. He seized from the shop $121\frac{7}{32}$ tolas of gold. This included 2 bars of 10 tolas each with foreign marks. The residence of the proprietor of the firms was next searched and from there 5 bars of 10 tolas each with foreign marks were recovered. According to the accounts maintained by Vanechand & Sons the stock of gold on hand should have been only 98 tolas. A perusal of the private accounts maintained by this firm showed that it had received gold from the petitioners in these cases in the past and that the receipts of such gold were not accounted for in the regular account-books. On 10th November, 1957, Bijraj, son of Vanechand Bhatwada, who was managing the business stated that the several gold bars bearing foreign marks and weighing 70 tolas which had been seized from

* W.P. Nos. 88, 109, 110 and 111 of 1959.

22nd April, 1959.
(2nd Vaisaka—1881, Saka.)

the shop as well as from the residence were received from the petitioner in W.P. No. 110 of 1959. He also made a statement relating to the transactions of the firm with the petitioners in W.P. Nos. 109, 88 and 111 of 1959. He added that the gold was smuggled gold. On 30th November, 1957, he gave a further statement in which he admitted that the smuggled gold had been purchased from the petitioners in these four writ petitions.

Govindaraj, a clerk of Messrs. Vanechand & Sons, made statements on 18th November, 1957 and 23rd November, 1957, in which he stated that he used to go to Bangalore and purchase gold on behalf of the firm. He further stated that he had acquired 7 bars of gold from the petitioner in W.P. No. 110 of 1959 on 6th November, 1957. Sampathraj, the second son of Vanechand, gave a statement on 10th November, 1957, in which he explained that his brother Bijraj was in charge of bullion transactions and that the gold bars seized from the house would have been kept there by his father and that the clerk Govindraj was entrusted with the duty of purchasing gold. He added that some 4 days previously Govindaraj had been to Bangalore to purchase gold. Vanechand gave a statement on 14th November, 1957, in which he admitted that the gold with foreign marks had been brought from Bowrilal of Bangalore, the petitioner in W.P. No. 110 of 1959.

The information obtained from these individuals was passed on to the Departmental Officers in Bangalore and they recorded statements from each of the four petitioners. All of them denied that they had any connection with Vanechand & Sons. Three of them denied even the knowledge of the existence of the firm of Vanechand & Sons at Vellore. They also denied that they had any telephonic contacts with that firm. The partner of the firm Bowrilal (W.P. No. 110 of 1959) however, admitted that he knew Vanechand in connection with some matrimonial proposals.

The Collector of Central Excise, Madras, gave a personal hearing to the counsel of the petitioners and finally recorded this view :

"As regards the four Bangalore parties I consider that these four parties at Bangalore were the persons concerned in the smuggling of gold which they had been passing on to the firm at Vellore."

In this view he imposed a penalty of Rs. 6,000 on the petitioner in W.P. No. 88 of 1959, of Rs. 25,000 on the petitioner in W.P. No. 109 of 1959, of Rs. 25,000 on the petitioner in W.P. No. 110 of 1959, and of Rs. 12,000 on the petitioner in W.P. No. 111 of 1959. These individuals have, therefore, come to this Court for the issue of an appropriate writ to quash the order of the Collector imposing these penalties on them.

Item 8 of the Schedule to section 167 of the Sea Customs Act so far as it is here material runs as follows :

" If any goods, the importation or exportation of which is for the time being prohibited or restricted............be imported into or exported from the States contrary to such prohibition or restriction, or—

If any attempt be made so to import or export any such goods........such goods shall be liable to confiscation ; any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees."

We are not here concerned with the export of any gold but only with its import. To bring the petitioners within the terms of Item 8 it is necessary to establish either that they actually imported the gold or were concerned in the import of gold. That is to say, it must be shown that they had arranged for the import of the gold or abetted the import of the gold or received it immediately after the import, the receipt being the final step in the process of importation. In other words, they must have either actually committed the offence of importation or have been accessories to it either before the fact or after the fact. The terms of Item 8 so far as it relates to attempt to import need not concern us here because even according to the department this is a case where the unlawful import of gold had been completed. To be

in possession of the gold, or to sell the gold, or to buy the gold, once the process of importation assuming the importation is unlawful is completed and independently of the series of acts connected with such importation will not fall within the terms of Item 8 of the Schedule.

In this connection, reference may be made to the decision of Rajagopala Ayyangar, J., in W.P. No. 425 of 1956. That was a case where a person was proceeded against departmentally for having purchased gold which it was believed, had been smuggled into the country. The Collector of Customs dealt with him under section 167, Item No. 8. He then came to this Court for the issue of an appropriate writ and the petition was allowed. In dealing with the matter Rajagopala Ayyangar, J., observed :—

" The ground upon which the Officer held the Petitioner guilty of an offence under the Sea Customs Act was that he had " aided or abetted " the commission of the offence of illegal importation. It is not the case for the respondent that the petitioner induced, aided or abetted the Arabs to effect the illegal importation of gold ; he was not an " accessory before the fact " which is the meaning of the expression " abetted " used by the Collector of Excise in his order. The petitioner no doubt purchased the gold and on the finding of the Officer, knowing that it was smuggled, but that was long after the gold was smuggled and the petitioner was no party to the smuggling of the gold. It was therefore a misnomer or misapplication of the words to term the act of the petitioner in purchasing the gold that he had " aided or abetted " the illegal importation ".

This decision was followed by a Bench of this Court in W.P. No. 691 of 1957. Delivering the judgment of the Bench, Rajagopalan, J., observed :

" The knowledge that what he was purchasing was smuggled gold, would not be evidence of participation in the act of smuggling itself, which is what is constituted an offence under the first column of section 167 (8). To put it in other words, even if the act of purchase constituted the petitioner an accessory after the fact, that would not suffice to hold that the petitioner was " concerned in the offence " specified in the first column of section 167 (8). Even if a person purchases gold with the full knowledge that that gold has been smuggled into the country that by itself will not constitute him a person concerned in the antecedent and completed act of smuggling. It was only on proof that the petitioner was concerned in one or the other of the offences set out in the first column of section 167 (8) that the petitioner would have been liable to suffer the penalty prescribed in column 3 of section 167 (8) ".

This view was reaffirmed in the judgment delivered a few days later in W.P. No. 247 of 1957.

To show that the petitioners in these cases imported the gold in question or were concerned in its import, there is really no legal evidence whatsoever. The Collector of Central Excise, Madras, relied upon these circumstances : (1) statements made by Bijraj, Sampathraj, Vanechand and Govindaraj to the effect that the firm of Vanechand & Sons had purchased gold from these petitioners; (2) the circumstance that the firm of Vanechand & Sons had been keeping separate accounts in respect of these and other purchases, (3) the frequent trunk telephonic communications between the firm of Vanechand and the petitioners, (4) the inability of the petitioners to explain satisfactorily how they came into possession of the gold and finally, (5) his conclusion that the statements which the petitioners gave are false. All these facts neither severally nor cumulatively show that the petitioners imported the gold or were concerned in its import.

Learned counsel for the department explained that in 1957 smuggling of gold along the West Coast of South India was on such an extensive scale that the Court would be justified in taking judicial notice of the fact. He then referred to *Illustration* (*a*) to section 114 of the Evidence Act and contended that the Court would be justified in presuming that the petitioners were concerned in the unlawful importation of the gold. But so far as I can see there is no warrant for presuming that the gold we are dealing with was imported in India in 1957, or in fact at any particular time and, therefore, there is no scope for the application of any such presumption on the analogy of *Illustration* (*a*) to section 114 of the Evidence Act. It must also be borne in mind that mere possession of gold which has been unlawfully imported into India cannot be dealt with under Item 8 of the Schedule to section 167. Learned counsel for the department next referred to the decision in *Bhatnagars &*

Co. Ltd. v. *Union of India*[1], and contended that before this Court can interfere it must be satisfied that there is no evidence whatsoever on the basis of which the Collector of Central Excise could have come to the conclusion he did. Now, as I have tried to explain there is no legal evidence whatever to support the conclusion of the Collector of Central Excise that the petitioners either imported the gold or were concerned in its import. The various circumstances referred to by the Collector of Central Excise might justify the belief that they knew that the gold had been imported into the country unlawfully. It may also be that the petitioners were attempting to evade various other laws. All that will not suffice to bring them within the scope of Item 8 in the Schedule to section 167. That being so these writ petitions must be and are allowed. The orders complained of are quashed There will be no order as to costs.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

T. V. Moidu and another .. *Petitioners**

Motor Vehicles Act (IV of 1939), section 42 (1)—Offence under—When committed—Use or permit the use of any vehicle—If includes mere driving of such vehicle.

The expression ' use or permit the use of the vehicle' in sub-section (1) of section 42 of the Motor Vehicles Act is not the same thing as driving or being in charge of the vehicle. The scheme of the Act makes a distinction between the user of a motor vehicle and the ' driving ' of such a vehicle each of which act is made punishable for certain purposes. In order to constitute a breach of section 42 (1) of the Act, the vehicle, whether stationary or moving, should be found in the course of its user for the purpose for which it is intended at a place which is not authorised by the permit.

The mere fact that a goods vehicle is found going empty in a route not covered by its permit will not be a breach of section 42 (1) of the Act unless it is proved that it was going by that unauthorised route in the course of its user as a goods transport vehicle.

Petition under sections 425 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the Order of the Court of the Additional First Class Magistrate, Coonoor, in S.T.R. Nos. 1737 and 1738 of 1958.

T. Chengalvarayan, for Petitioners.

The Public Prosecutor (*P. S. Kailasam*), for the State.

The Court made the following

ORDER.—These are two Revision Cases preferred against the convictions and sentences by the learned Additional First Class Magistrate, Coonoor, in S.T.R. Nos. 1737 and 1738 of 1958.

The facts are short and the point of law raised by the learned advocate Sri T. Chengalvarayan, is an interesting one. The public transport vehicle, lorry K.L.D 390, has got a permit to ply from Kundah to Ootacamund. But the route is *via* Korakundah and not Selas. On 25th July, 1958, K.L.D. 390 was found being driven by the driver Moidu at that time, on a trip totally unconnected with its use under the permit granted to it at Selas Bazaar. It is admitted that *via* Selas is the shortest route to Ootacamund from Kundah. The driver Moidu and the owner Ayyappan have been charge-sheeted for an offence under section 42 (1) read with section 123 of the Motor Vehicles Act and under rule 226 of the Motor Vehicles Rules read with section 112 of the Motor Vehicles Act. Both of them were convicted and fined. Hence these Revision Cases.

I must now briefly set out the relevant provisions of law. Section 2 of the Motor Vehicles Act sets out the definitions. A "goods vehicle" is defined in section 2 (8) as meaning any motor vehicle constructed or adopted for use for the carriage

1. (1957) S.C.J. 546 : 1957 S.C.R. 700 : A.I.R. 1957 S.C. 478.

* Cr. R. C. Nos. 1155 and 1158 of 1958. 24th September, 1959. (2nd Asvina, 1881, Saka).

of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers. The term " owner " is defined in section 2 (19) and as pointed out by Niyogi, J., in *Bhagwant Gopal*, In re[1], the word " owner " occurring in the various sections of the Act would take in all persons in the sense in which it is ordinarily understood and that ownership as opposed to possession implies title with the incidental right of transfer. In the context of a hire-purchase agreemeut, it will mean the person in possession of the vehicle under that agreement. The word " permit " is defined in section 2 (20) as meaning, any document issued by the Commissioner or a Provincial or Regional Transport Authority authorising the use of a transport vehicle as a contract carriage, or stage carriage, or authorising the owner as a private carrier or public carrier to use such vehicle. The terms " private carrier " and " public carrier " are defined in clauses (22) and (23). The words " plying for hire " in this connection, it may be pointed out, have the same significance in India as they have in England. The words " to ply for hire " as used in the Rules and as they are gencrally understood, ordinarily mean to exhibit a vehicle in such a way as to invite those, who may desire to do so, to hire it or travel in it on payment of usual fares and also to offer its use on payment to any member of the public thereby, soliciting custom. The Motor Vehicles Act in connection with the travelling of a vehicle makes a sharp distinction between driving a vehicle, being in charge of the vehicle, and using the vehicle. It need not be pointed out that driving a vehicle is nothing more than a physical or manual act of propelling it. To be in charge of the vehicle, means something different, *viz.*, the vehicle being in the custody of the person who is said to be in charge of that vehicle and that person may or may not be performing the function of driving. The word "using" does not mean the same thing as driving or being in charge of the motor vehicle. The word " use " connotes that the travelling or stationary vehicle at the time when it becomes the subject-matter of a *delictum* was at the place where it is found in the course of its user in accordance with the permit granted to it and which has been defined above.

The word " use " as defined in the standard lexicons is as follows :

Murray's New English Dictionary ..	The act of employing a thing for any (esp., a profitable) purpose ; the fact, state, or condition of being so employed ; utilization or employment for or with some aim or purpose, application or conversion to some (esp. good or useful) end.
	To ply or carry on (an occupation, profession, etc.) ; to follow or exercise ; to discharge the functions of (an office). To make use of (some immaterial thing) as a means of instrument to employ for a certain end or purpose.
Funk and Wagnall's New Standard Dictionary.	To employ for the accomplishment of a purpose ; turn to account ; make use of.
Webster's International Dictionary of English Language.	Law.—That enjoyment of property which consists in its employment, occupation, exercise, or practice.
Stroud's Judicial Dictionary ..	A steam-roller crossing one country in order to do work in another is, whilst passing over highways in its journey, being ' used ' within section 32, Highways and Locomotives (Amendment) Act, 1878.

Section 42 (1) of the Motor Vehicles Act states :

" No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or countersigned by a Regional or State Trasnport Authority..........authorising the use of the vehicle in that place in the manner in which the vehicle is being used............"

Section 123 lays down :

1. A.I.R. 1943 Nag. 22.

"Whoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of section 22 or without the permit required by sub-section (1) of section 42 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, shall be punishable.........."

Bearing the above definitions in mind, let us examine the facts of this case. First of all, the lorry in question was found at Selas on its way from Kundah to Ootacamund, not in the course of the business covered by the permit. It was coming from Kundah to Ootacamund in order to be sent to Coimbatore. Therefore, the lorry was not found at Selas even in any manner remotely connected with its plying on business. Secondly, the lorry-driver had taken the Selas route because it is the short-cut route to Ootacamund. Thirdly, the lorry was as a matter of fact found empty, showing that it was not going about on business and for which the permit has been issued. It is not the case for the prosecution that the lorry was detected in the course of being used as a transport vehicle.

In these circumstances the contention of the learned advocate, Mr. Chengalvaroyan, is that the provisions of sections 42 and 123 of the Motor Vehicles Act have not been offended appears to me sound. Section 42 requires the use or permitting the use of the transport vehicle contrary to the conditions of the permit. I have already pointed out how the term "use" is different from "driving" and "be in charge of". A study of the sections of the Motor Vehicles Act shows how the Legislature was fully aware of these distinctions. That is why in section 42 (1) there is no reference to "driving" but only to "using" and "permitting the use" of the vehicle. If the Legislature had really meant, even the mere physical act of driving irrespective of using it, contrary to the conditions of the permit, it would have made it clear as it has done in section 123 which has been reproduced above. The Legislature has carefully confined section 42 (1) to "using" only, because otherwise it would lead to illogical absurdities. If a person even moves a lorry outside his garage to a near-by pond where it has to be periodically washed, he could be run in under section 42 (1) of the Act. The law in the immortal language of Mr. Bumble may be an ass, but it cannot be so asinine as all that. The expression "to use" has unfortunately escaped judicial consideration in this country. The question of the meaning of this expression was, however, considered in connection with the Motor Vehicles (Construction and Use) Regulations, 1937, in *Gifford* v. *Whittaker*,[1] and while the question was directed at discovering who was the "person using" the vehicle some points of guidance emerge. Counsel drew attention to the fact that other regulations use the expressions "to drive" and "to be in charge of" rather than "to use": this is equally true of other road traffic offences. It is not, for example, an offence "to use" a motor vehicle on a road without holding a driving licence, only to drive it in such circumstances. The implication then is that "using" is not the same as driving or being in charge of a motor vehicle.

Analogies can be drawn from the English Gaming and Wagering Acts, where the offence of keeping or using a gaming house can only be committed by one who is the owner, occupier, or a person having the use of it, which means one who has the use, as a licensee to carry on the business, and does not include a person who uses the place in the sense of merely going in to avail himself of the business which happens to be carried on there : See Halsbury's Laws of England (Third Edition) Volume 18, page 192.

The learned Public Prosecutor brings to my notice the decision of the Supreme Court in *State of Uttar Pradesh* v. *Bansraj*[2]. But the point considered there is not the point which falls for determination here, *viz.*, the distinction between "driving" and "using". The point which arose for determination there was, whether the driver of a motor vehicle who is not its owner and who drives in contravention of the conditions of the permit under section 42 (1) would fall within section 123 of the Act. This is not the case here.

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1. L.R. (1942) 1 K.B. 501. 2. (1959) S.C.J. 101 ; (1959) M.L.J. (Crl.) 20.

The net result of this analysis is that section 42 (1) has to be read as follows :

"No owner of a transport vehicle shall use or permit the use of the vehicle as a *transport vehicle* in any public place......"

On that conclusion it follows that the convictions cannot stand. They are hereby set aside and the accused are acquitted. The fine amounts, if collected, are directed to be refunded.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Public Prosecutor .. *Appellant**.

v.

P. T. Narayanaswamy .. *Respondent.*

Madras Village Panchayats Act (X of 1950), sections 2 (7), 25 (3) and 103—'Executive Authority'—If includes a temporary President.

A temporary President of a panchayat appointed under section 25 (3) of the Madras Village Panchayats Act is as much a 'President of a Panchayat' within the meaning of the Act and as such he is competent to file a complaint under section 103 of the Act.

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (accused) of offences under section 116 (3) and 116 (2) of the Madras Village Panchayats Act (1950) by the District Magistrate (J) North Arcot, at Vellore, in C.As. Nos. 352 and 353 of 1958 respectively on his file (C.C. Nos. 1500 and 1501 of 1958 on the file of the Court of the Sub-Magistrate, Vellore.)

The Public Prosecutor (*P. S. Kailasam*) for State.

K. Narayanaswami Mudaliar, R. Rajagopalan and *T. Ramaswamy*, for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals are by the State against the acquittal of the respondent who is the same in both the cases. The respondent was the President of the Panchayat Board of Poigai Village. By an order of the Inspector of Municipal Councils and Local Boards, dated 8th January, 1958 (Ex P-10), the respondent was removed from his office of presidentship. By the same order of removal the Vice-President was asked to take charge of the office of the President of the Panchayat Board. But the Vice-President replied to this communication stating his incapacity to take charge as he was blind. Hence the District Panchayat Officer in exercise of the powers delegated to him by the Inspector of Municipal Councils and Local Boards in his proceedings R.O.C. No. 5044/57, dated 29th June, 1951, appointed under section 25 (3) of the Madras Village Panchayats Act, one Govindaswami, the complainant in this case, to be the temporary President of the Poigai Panchayat and he was directed by the said order to exercise the functions of the President until a new President is declared elected and he assumes office. Certain limitations on his powers were also mentioned in the order of appointment. The order appointing Govindaswami as temporary President was dated 9th March, 1958. It was received by Govindaswami on 12th March, 1958. Apparently he took charge immediately because there is no clear evidence as to when he took charge ; it must have been either on 12th March, 1958, or later. He then asked the accused (the respondent herein) to hand over the keys and various other papers to him ; but the respondent never did so. The complainant gave notice on 21st March, 1958, calling upon the respondent to hand over charge. It was duly served upon the respondent but still he continued to be recalcitrant and did not hand over

* Cr. App. Nos. 44 and 45 of 1959. 18th September, 1959. (27th Bhadra 1881—Saka)

charge. A second notice also was sent and it also remained not complied with. Thereupon, after informing the Deputy Panchayat Officer and other officers, the complainant launched his complaint on 27th May, 1958.

The Sub-Magistrate of Vellore who heard the case convicted the respondent, finding him guilty of an offence not only under section 116 (3) of the Act but also under section 116 (2) as two cases were filed separately. In appeal the Distict Magistrate of Vellore acquitted the accused on the ground that a temporary President is not a person who can file the complaint. He has also held in paragraph 4 of his judgment that the prosecution is barred by limitation.

The reasoning of the District Magistrate is this. Under the provisions of section 103 of the Act, a complaint is to be made within three months of the commission of the offence either by the police, or by the executive authority or a person expressly authorised in this behalf by the Panchayat or executive authority; this is certainly not a case where the police has filed the complaint; this is not a case where the complainant has been expressly authorised in this behalf by the panchayat or executive authority to file a complaint. The next question is whether a temporary President falls within the definition of executive authority as that is the only other person competent to file a complaint under the provisions of section 103.

" Executive authority " has been defined in section 2, clause (7) as follows :—

"2. (7) 'Executive authority' means—

(i) In the case of a panchayat having an executive officer, the executive officer and if there is no executive officer in charge, the President of the panchayat."

The District Magistrate says that it is not mentioned in the complaint or in the evidence whether there was any executive authority appointed for this Panchayat Board or not. The complaint being made only by the temporary President appointed by the District Panchayat Officer, the District Magistrate finds that under section 2 (7) of the Act the President cannot include a temporary President or a Vice-President. He, therefore, holds that this complainant is not competent to file a complaint.

The first question, therefore, that arises for consideration in this appeal is whether the complaint by this temporary President is competent.

Under section 25 (3) of the Act, when the office of President is vacant, then the functions of the President shall devolve on a member of the Panchayat appointed by the Inspector in that behalf. Under the sub-clause to clause (3) of section 25 the member of the panchayat so appointed (who shall be styled the temporary President) shall perform the functions of the President subject to such restrictions and conditions as may be prescribed. In accordance with the provisions of sub-clause (3) the District Panchayat Officer to whom the Inspector of Local Boards and Panchayats under the provisions of clause (2) of section 127 has delegated his powers has appointed the complainant as President to discharge all the functions of the President. By the order Exhibit P-1, dated 9th March, 1958, the complainant was empowered to exercise the functions of the President. The President has been defined as meaning 'President of a Panchayat'. Though the complainant is styled as temporary President he is President within the meaning of that expression in the Act. The statute only refers to President, Vice-President and members of the Panchayat Board. There is no provision as such for temporary presidentship and whoever is appointed to exercise the functions of the President becomes the President of the Panchayat, whether it is by devolution of the powers under the statute by appointment by the Inspector of Local Board or under the delegation of powers by him by the District Panchayat Officer. Though the complainant may be styled as temporary President, in law, he is really the President of the Panchayat Board for all purposes. He is, therefore, competent to file the complaint. The reasoning of the District Magistrate that because he is only a temporary President and, therefore, he could not file the complaint is not sustainable. The complaint is, therefore, a valid one.

The other question that the prosecution is barred by limitation is dealt with by the District Magistrate in paragraph 4 of his judgment. He states that the previous President was removed from office by letter, dated 8th January, 1958, served on him on or about 24th January, 1958. The complaint was filed on 27th May, 1958. The District Magistrate then observes :

" Even though the complainant might have been appointed only by the order, dated 9th March, 1958, the accused should have as per section 116 of the Act handed over the records as soon as his term of office expired either to his successor in office if there was one or to the other prescribed authority."

Under section 116, clause (3), any President or temporary President or Vice-President of a Panchayat who fails to hand over any documents of, or any moneys or other properties vested in or belonging to, the Panchayat, which are in or have come into his possession or control, to his successor in office or other prescribed authority....shall be 'punishable, etc.' " Prescribed " means, according to the definition of that word in section 2, clause (17) "Prescribed by the Government by rules made under this Act." In the original order removing the President he was asked to hand over charge only to the then Vice-President who was appointed as the President in the place of the outgoing President. But the Vice-President promptly replied by stating his inability to take charge of the office and thereafter the present complainant was appointed. There was, therefore, no prescribed authority to whom the outgoing President could hand over charge in view of the refusal of the then Vice-President to take charge of it. The only person therefore, to whom the removed President could hand over charge is the person appointed by the prescribed authority. Though the prescribed authority is the Government, yet by delegation of its functions under section 127 of the Act the District Panchayat Officer becomes the authority to appoint a President and the person therefore to whom charge may be handed over becomes the complainant in the case by virtue of his appointment as temporary President. That was only on 9th March, 1958 and the order was received by him on 12th March, 1958. Even assuming that he must have taken charge on 12th March, 1958, it cannot be said that the complaint filed on 27th May, 1958, is barred by limitation, as it was within two months of the refusal to hand over charge. The reasoning of the District Magistrate, therefore, even on the ground of limitation is not sustainable.

The order of acquittal on the grounds mentioned by the District Magistrate is not sustainable. The order is perverse and it is set aside. The respondent is, therefore, convicted of the offence charged in both the cases. But I think that a sentence of Rs. 25 will meet the ends of justice in each case. The respondent is accordingly sentenced to pay a fine of Rs. 25, in each case, in default to undergo simple imprisonment for two weeks. The excess fine if paid under the conviction by the trial Court will be refunded to him, if that had not been already done.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Oomayan *alias* Baluchamy .. *Accused**

Criminal Procedure Code (V of 1898), section 361—Procedure under—If applicable to deaf and dumb accused.

The procedure indicated under section 361 of the Criminal Procedure Code cannot be applied to the case of a deaf-mute because under that section whenever any evidence is given in a language not understood by the accused it should be interpreted to him in open Court in a language understood by him. A deaf and dumb man can understand by signs and gestures, which do not form a language within the meaning of section 361.

Case Referred for the orders of the High Court under sections 341 of the Criminal Procedure Code, by the Sub-Magistrate, Paramakudi, in his letter No. R.C.

* Crl. R. C. No. 347 of 1959. (Case Referred No. 119 of 1959.) 1st May, 1959. (11th Vaisakha, 1881—Saka.)

VI/59 dated 9th August, 1959 and forwarded by the District Magistrate of Ramanathapuram at Devakottai, with endorsement No. N.B.A. No. 103 of 1959, dated 12th March, 1959.

The Public Prosecutor (*P. S. Kailasam*), on behalf of State.

The Court made the following

ORDER.—This is a reference under section 341 of the Code of Criminal Procedure. The accused is charged under section 201 read wih section 302, Indian Penal Code. The Magistrate has committed the accused to Sessions. In paragraph 2 of his letter of reference the Magistrate states :

" Oomayan *alias* Baluchamy accused in this case is completely deaf and dumb and unable to understand the proceedings. Therefore, Sri Williams, the Headmaster, Municipal Deaf and Dumb School, Karaikudi, was engaged and the proceedings of the Court were explained to the accused by signs as required under section 361, Criminal Procedure Code and the accused understood the proceedings."

To begin with, section 361 cannot apply to this case, because under that section whenever any evidence is given in a language not understood by the accused, it should be interpreted to him in open Court in a language understood by him. A deaf and dumb man can understand by signs and gestures. Signs and gestures do not form a language, though loosely it may be called the language of the deaf and dumb. But that is not meant by section 361. Section 361 therefore does not apply.

In the earlier portion of paragraph 2 of his letter the Magistrate finds that the accused is completely deaf and dumb and unable to understand the proceedings. Subsequently, in the same paragraph he says that the accused understood the proceedings. Section 341 says :

" If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the enquiry................"

But in this case the Magistrate himself finds that the accused understood the proceedings. I am unable to see how this reference lies to this Court. The reference is therefore returned. It is for the Sessions Judge to whom the case has been committed to consider whether this is a case for reference under section 341, Criminal Procedure Code.

R.M. ——— *Reference returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Adimoola Mudaliar .. *Petitioner**.

Penal Code (XLV of 1860), sections 378 and 425—Offence under—What amounts to—Compelling a person to pay his lawful dues by withholding his property—If an offence.

In order to constitute an offence of theft or mischief the necessary criminal intention has to be established. In the absence of such an intention the mere fact that a person removed another's property with a view to compelling the other to pay up his lawful dues, such as rent, etc., will not make him an offender. Forcible removal of property of another may amount to a tort but not a penal offence unless it is accompanied by the intention to cause wrongful loss or obtain wrongful gain.

Matabbar Shekh v. *King Emperor,* (1909) 14 C.W.N. 936 and *Daulat Shaw* v. *Emperor,* A.I.R. 1921 Pat. 390, referred.

Petition under sections 435 and 439 of the Code of Criminal Procedure (1898), praying the High Court to revise the judgments of the Court of the District Magistrate (J) Vellore, dated 27th September, 1958 and made respectively, in C.A. Nos. 348 and 347 of 1958 (C.C. No. 1256 and 1255 of 1958 respectively, on the file of the Court of the Sub-Magistrate, No. I, Vellore).

* Crl. R. Cs. Nos. 37 and 67 of 1959. 20th August, 1959.
(Crl. R. Ps. Nos. 37 and 67 of 1959.) (29th Sravana 1881—Saka.)

K. Kalyanasundaram, for Petitioner.

T. A. Bhyme, for the Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—I agree with learned counsel for the revision petitioner that, under peculiar circumstances of these two cases, the revision petitioner (Accused 1 in the Court below) ought not to have been convicted either under section 379, Indian Penal Code, or under section 426, Indian Penal Code. We may take the facts as established that the revision petitioner was the lessee from the municipality for the purpose of collecting the rents due in respect of temporary stalls in the Municipal Market, that the complainant in the lower Court did not pay rent for a temporary projection, and, that this revision petitioner removed certain planks in the projection on the night of 14th May, 1958, in order to compel the complainant to pay the rent, or to enforce his rights. When the complainant wanted the return of the planks, the revision petitioner is alleged to have told him, according to the evidence, that the planks would be returned only when the rent was paid.

In these circumstances, the question is whether the revision petitioner had the necessary criminal intention in respect of either offence. The findings of the learned District Magistrate (J.) in paragraph 5 of his judgment are heavily in favour of the revision petitioner. But, having thus upheld the *bona fides* of the revision petitioner's conduct, the learned Magistrate proceeds to convict him and admonish him under section 3 of the Madras Probation of Offenders Act, apparently upon the view that the actions of the revision petitioner were high-handed and not strictly justified.

The learned District Magistrate (J.) has overlooked the fact that an act may give rise to a claim in damages, or may be a tort or civil wrong, but may not nevertheless constitute any crime. To constitute a crime, the intention required by the criminal law must be established as existing in the particular case. My attention has been drawn to two very interesting decisions, under closely similar circumstances. In *Matabbar Shekh* v. *King Emperor*[1], the Calcutta High Court held that the action of an employee of the Steam Navigation Company is distraining the umbrella of the complainant, who did not pay the fare for a ticket, could not be held to amount to the criminal offence of theft. In a decision of the Patna High Court in *Daulat Shaw* v. *Emperor*[2], a forcible removal of certain property in order to realise legal dues, but not with a view to make wrongful gain or to cause wrongful loss, was held not to amount to theft.

In the present case, it is clear that the revision petitioner did not have the intention either to cause wrongful loss to the complainant, or to obtain wrongful gain for himself. Similarly he had no criminal intent, as defined in section 425, Indian Penal Code. His sole intention appears to have been to do something which would compel the complainant to pay him the lawful rent. That might presumably give rise to an action based upon tort or civil wrong, but it constitutes no offence under the Indian Penal Code.

The revision is accordingly allowed and the petitioner will be acquitted.

R.M. *Revision allowed.*

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1. (1909) 14 C.W.N. 936.
2. A.I.R. 1921 Pat. 390

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

V. Krishna Iyer .. *Petitioner**

v.

Health Officer, Pudukottai Municipality, Pudukottai .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *section* 16 (1) *and rule* 49 (2) *of the Rules—Keeping chilly-paste in an imperfectly tinned container in a hotel—If an offence.*

Though the language of rule 49 (2) of the Prevention of Food Adulteration Rules is not very happy, still having regard to the context and the broad purpose of the legislation the rule will apply to any food or ingredient of food which is ultimately intended for sale whether directly as such or as part of some other food prepared with it. Hence where chilly-paste is kept in an imperfect container (untinned container) in a hotel, the rule will be attracted as the chilly-paste is intended for use in the preparations made in the hotel.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Pudukottai, dated 11th December, 1958 and made in C.C. No. 222 of 1958.

K. S. Varadachari and *S. Krishnamurthi*, for Petitioner.

M. Narayanamurthi for the Public Prosecutor (*P. S. Kailasam*), for the State.

The Court made the following

ORDER.—Upon the facts of evidence in this case, I see no grounds to interference in revision with the conviction of this petitioner under rule 49 (2) of the rules framed under Central Act XXXVII of 1954 read with section 16 (1) of the Act. The argument before me is that, assuming the facts as established that the revision petitioner did store or keep chilly-paste in an untinned container (there is no specific evidence about the substance of which the container was made, but very probably it was brass or copper), merely keeping such an ingredient of food in an untinned vessel by a hotel proprietor would not attract the language of rule 49 (2), and that these facts would not come within the mischief of that rule.

Rule 49 (2) runs as follows :—

"No person shall use for manufacturing, preparing or storing any food or ingredeient of food intended for sale, any utensil or container which is imperfectly enamelled or imperfectly tinned...."

In the case before us we must consider it as established that the chilly-paste was kept in an imperfectly tinned container, and clearly the facts and probabilities warrant the inference that it was not merely intended for domestic consumption, but was intended to be used as an ingredient of the food to be sold in the hotel. The learned counsel for the revision petitioner urges that, even so, the strict terms of rule 49 (2) would not be applicable, because there is no evidence that this ingredient of food (chilly-paste) was directly intended for sale. Taking the language of rule 49 (2) as it stands, and reasonably construing the words of the section, I have no doubt that the rule will apply both to any food, and to any ingredient of food, which is ultimately intended for sale, whether directly, or as part of the prepared food. Any other interpretation would make the rule practically meaningless, and restrict its scope in a manner which will defeat the very purpose of the rule. It is possible to maintain the view that the language is not very happy, and that the construction of the clause leaves room for improvement. Nevertheless, the intention, the broad purpose of the rule, and the context, have all to be taken into account in arriving at a reasonable interpretation. Under those circumstances, I have no doubt that rule 49 (2) read with section 16 (1) of the Act did apply to the facts of this case, and the conviction must therefore be confirmed.

As regards the sentence, this seems to be not merely the first offence, but a highly technical one. There is some evidence to show that chilly-paste kept in an

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* Crl. R.C. No. 50 of 1959. (Crl. R.P. No. 50 of 1959.) 19th August, 1959. (28th Sravana 1881—Saka.)

untinned container in this fashion, is not likely to become noxious or directly to injure the health of any consumer. Taking that circumstance into account, I reduce the sentence to a fine of Rs. 20, or in default to rigorous imprisonment for two weeks. The excess fine if paid will be refunded.

R.M. ——— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Sandanasami Pillai .. *Petitioner**

v.

C. Ponnuswami and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-A—Scope of.

Section 33-A of the Industrial Disputes Act does not prohibit every alteration in the condition of service of a workman during the pendency of proceedings before a Labour Court or Tribunal. What is prohibited is the alteration of the conditions of service in regard to any matter connected with the dispute. Thus there must be some point of connection between the pending dispute and the act of the employer in respect of which a complaint may be made under section 33-A. Where the question referred to the Labour Court was a general one regarding the level of wages in a particular class of industry, retrenchment of individual worker in any particular establishment engaged in such industry, during the pendency of such a reference cannot amount to a contravention of section 33-A of the Act and the Labour Court could not get any jurisdiction under it.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Case No. 7 of 1958 on the file of the Labour Court, Madras and quash the order therein, dated 27th June, 1958, namely the award of compensation to Respondents 1 to 4 so far as it is against the petitioner.

T. S. Kuppuswami Ayyar, for Petitioner.

R. Sundaralingam, for Respondents.

The Court made the following

ORDER.—The petitioner is the proprietor of a cheroot manufacturing business in Poraiyar, Tanjore District. Respondents 1 to 4 were employees under him. On or about 7th October, 1957, these four persons together with some others who were working as cheroot rollers under the petitioner demanded increased wages and to enforce that demand they staged a stay-in-strike. On 23rd October, 1957, a settlement was arrived at between the petitioner and the eight workers in question in the presence of the President of the Panchayat Board, Poraiyar. The parties agreed that wages at a certain rate should be paid and received. It was also agreed that, on account of the loss which the petitioner had been sustaining he would be free to discharge four of the eight workers at the end of one month commencing from 23rd October, 1957. By G. O. 3765, dated 15th November, 1957, the Government of Madras referred to the Labour Court at Madras the following question for adjudication :

" Whether the rate of wages paid to the workers for the manufacture of cigars require any revision and if so to what extent ".

The reference was a general one which concerned seven factories. On 23rd November, 1957, in pursuance of the settlement that had been arrived at on 23rd October, 1957, before the President of the Panchyat Board of Poraiyar the petitioner retrenched the first four respondents from his service. On 31st March, 1958, the Labour Court, Madras, passed an award on the question the Government had referred to it, in G.O. 3765. Meanwhile, that is to say, on 25th March, 1958, the first four respondents complained to the Labour Court that they had been wrongfully discharged from ser-

* W.P. No. 994 of 1958. 1st September, 1959. (10th Bhadra 1881, Saka.)

vice. In the complaint which the respondents preferred they did not specify under what section of the Industrial Disputes Act they invoked the jurisdiction of the Labour Court. But the Court presumed that it was under section 33-A. The petitioner filed a counter setting out his version of the case. The Labour Court found :

" Though there is only interested oral evidence on both sides I am inclined to believe the case of the Respondent (Petitioner in this Court). He appeared to be an honest and truth speaking witness.'"

In other words the Labour Court found that the first four respondents had been discharged in accordance with the settlement which had been arrived at on 23rd October, 1957, in the presence of the President of the Panchayat Board. Nonetheless it held that section 25-E of the Industrial Disputes Act had been contravened since notices of retrenchment had not been given in writing and retrenchment compensation had not been paid. He therefore held that the retrenchment was illegal and directed that various sums should be paid by the petitioner to the first four respondents as retrenchment compensation. The present petition has been filed for the issue of an appropriate writ to quash this order of the Labour Court.

The complaint of Mr. Kuppuswami Iyer, the learned advocate for the petitioner, that the order of the Court below was completely without jurisdiction appears to me to be well founded. Section 33-A of the Industrial Disputes Act no doubt provides that where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Labour Court any employee aggrieved by such contravention may make a complaint in writing to that Labour Court. Thereupon the Labour Court acquires jurisdiction to pass a proper award. But then when we come to section 33 it will be found that it does not prohibit the retrenchment or discharge of workmen during the pendency of any proceedings before the Labour Court. That section so far as it is now material runs as follows :

" During the pendency of............any proceeding before the Labour Court.............. in respect of an industrial dispute, no employer shall............

(2) *in regard to any matter connected with the dispute* alter to the prejudice of the workmen concerned in such dispute the conditions of service applicable to them ".

It will be noticed that it is not every alteration in the conditions of service that the section prohibits. What is prohibited is the alteration of the conditions of service in *regard to any matter connected with the dispute.* That is to say, there must be some point of connection between the dispute and the act in respect of which a complaint may be made under section 33-A. As already stated, the question referrd by the Government to the Labour Court in G.O. 3765 was a general question of the level of wages. No other question was referred to the Labour Court. Retrenchment of individual workers in particular establishments was outside the scope of the reference. Section 33-A could not have therefore been called in aid by the first four respondents.

Mr. Sundaralingam, the learned counsel for the respondents, contended that the retrenchment was illegal and that in any case the Labour Court has only given effect to the provisions of section 25-F. In these proceedings I cannot investigate the question whether the retrenchment was justified or not. If it was done in pursuance of the settlement effected before the President of the Panchayat Board, Poraiyar, as the Labour Court itself found it is very difficult to say that any contravention of the law was involved in such discharge. Besides even assuming that the retrenchment contravened section 25-F, the Labour Court acquired no jurisdiction to make any order. If the workers were aggrieved they should have gone to the appropriate authority under section 33-C of the Act. As the order made is one without jurisdiction it is hereby quashed. There will be no order as to costs.

R.M. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Meenakshi Achi .. *Appellant**

v.

N. M. Manikkam Chettiar and others .. *Respondents.*

Hindu Law—Mortgage of joint family property by father to discharge his antecedent debt—Bona fide *enquiry by the lender—Mortgage when binding on the son's interest in the property—Transfer of Property Act (IV of 1882), section 38—Rule as to enquiry.*

* * * * * *

An alienee making a *bona fide* enquiry as to the existence of the antecedent debt for the discharge of which the monies were borrowed ostensibly by a father would be protected, notwithstanding the fact that the monies borrowed were not proved to have been actually utilized for the discharge of the entire debt. Where the father mortgaged the joint family property in order to discharge his antecedent debt not tainted with illegality or immorality the sons' interest in the property would be liable for the amount borrowed.

No amount of *bona fides* on the part of the lender or the alienee would entitle him to sue the son in respect of a debt incurred by the father for an illegal or immoral purpose.

The rule as to enquiry is based on the inability of the lender or the alienee to control the disposition of the money once it leaves his hands.

The rule as to enquiry has found statutory recognition in section 38 of the Transfer of Property Act.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Pudukottai, in O.S. No. 14 of 1950.

T. R. Srinivasan and *S. Gopalaratnam*, for Appellant.

S. Tyagaraja Ayyar and *R. Viswanathan*, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal is against the decree and judgment in O.S. No. 14 of 1950 on the file of the Sub-Court, Pudukottai. The second plaintiff is the appellant. The suit was laid for recovery of a sum of Rs. 30,236-2-0 on the foot of a mortgage executed by the first respondent in favour of Lakshmanan Chettiar, the husband of the appellant, for a sum of Rs. 10,750 with subsequent interest at 9 per cent. per annum compoundable every 12 months. It was stated that Lakshmanan Chettiar was a benamidar for the appellant. Both Lakshmanan Chettiar and the appellant filed the suit, impleading the mortgagor as well as his two sons as parties thereto. Respondents 2 and 3 are the sons of the mortgagor. Respondents 4 and 5 are the subsequent encumbrancer and purchaser. The first plaintiff, Lakshmanan Chettiar, died, pending the suit.

At the time of the mortgage the 1st respondent was a member of a Hindu joint family consisting of himself and his younger brother. The mortgage, Exhibit A-1 created a security over three items of properties :

(1) a half share in a house in Pudukottai, (2) lands in the village of Rangiyam and (3) a half share in certain lands situated in Ammampatti village. Subsequent to the mortgage, there were disputes between the mortgagor and his brother, which resulted in the filing of O.S. No. 816 of 1938, on the file of the then Chief Court, Pudukottai, for partition of the joint family properties. The mortgagee, Lakshmanan Chettiar, was also made a party to the action. In the final decree, the first respondent did not get items 1 and 2 mentioned above for his share, but was allotted the whole of item 3, besides certain other properties.

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*Appeal No. 74 of 1953. 29th July, 1959.
(7th Sravana 1881—Saka.)

In the mortgage suit, out of which this appeal arises the appellant and her husband claimed that the amount due should be made recoverable on the security of the other items that fell to the share of the 1st respondent under the partition decree, as they should properly be held to be a substituted security. The defence to the suit was substantially threefold ; (1) that the mortgage was not binding on the interests of the 2nd and 3rd respondents, as the money was advanced neither for the necessities of the family nor for the actual discharge of any antecedent debt of the 1st respondent, (2) that the mortgagor was entitled to reliefs under the Madras Agriculturists' Relief Act (IV of 1938), and (3) that the mortgagee would not be entitled to a charge on the other properties allotted to the 1st respondent's branch in the partition except to an half share of the lands in Ammampatti village which was secured to him under the mortgage.

The learned Subordinate Judge found that the amount advanced under Exhibit A-1 was utilised in discharge of the antecedent debt of the first respondent only to the extent of Rs. 3,750, and that the balance was utilised in connection with the expenses of a bus service, a new business started by the first respondent. On that finding, he held (1) that the mortgage would be binding on respondents 2 and 3 only to the extent of Rs. 3,750; (2) that having regard to the value of the properties mortgaged, the ends of justice and equities of the case would be sufficiently met if a charge were created over the other half share in the Ammampatti lands, that is, the entire lands in Ammampatti village which fell to the share of the 1st respondent; and (3) hat the respondents were entitled to relief under the Madras Agriculturists' Relief Act and that after applying the provisions of the Act, the amount due under the mortgage would be only Rs. 18,600-7-9. On those findings, he passed a preliminary mortgage decree against the 1st respondent for Rs. 18,600-7-9, and respondents 2 and 3 were declared liable for a sum of Rs. 3,750 therein with subsequent interest according to the provisions of Madras Act (IV of 1938). The second plaintiff has preferred this appeal in so far as the decision of the lower Court went against her, namely, (i) in regard to the liability of respondents 2 and 3 for the entire amount under the mortgage, and (2) for the liability of the other properties allotted to the 1st respondent as substituted security. Mr. T. R. Srinivasan, the learned advocate for the appellant, did not argue the second of the two questions mentioned.

In this appeal we are concerned only with the question as to how far the claim under the suit mortgage can be enforced against the sons of the 1st respondent. Exhibit A-1 is the deed of mortgage. That recites that a sum of Rs. 10,750 was received by the mortgagor in cash to discharge the claim in a suit filed against the mortgagor by Messrs. A. S. Manickam & Co., and for the expenses relating to the motor service. There is no specification, in the document, of the respective amounts required for discharging the obligations to Messrs. A. S. Manickam & Co., and that which was required for the bus service. It is not disputed that there was a decree against the mortgagor in the suit (O.S. No. 35 of 1937, Chief Court, Pudukottai) filed by Messrs. A. S. Manickam & Co., that the mortgagor was having a bus service which was wound up 15 days after the date of the mortgage, and that the bus service was a new business started by the 1st respondent. It appears from the evidence that the bus service was run by the 1st respondent in partnership with a stranger, and the claim of Messrs. A. S. Manickam & Co., in O.S. No. 35 of 1937 was for an amount due in respect of motor accessories supplied to Manickam Chettiar. The liability was, evidently, incurred in respect of the bus service started by Manickam Chettiar, the 1st respondent. It is needless to point out that, while the 1st respondent might not have been able to alienate the family property so as to bind his sons for the purpose of the new business, the liability incurred by him therein could support a subsequent alienation. In the latter case the liability of the father having accrued already, the alienation made by him to secure payment or for the discharge of such a debt would be justified on the footing that it was for the purpose of securing or paying off antecedent debts.

Exhibit A-8 shows that on 3rd September, 1937, an interim decree was passed in O.S. No. 35 of 1937 by consent for a sum of Rs. 3,500 and the amount was to be

paid in two instalments of Rs. 1,750 each before October, 1937. A subsequent decree was passed in the same suit on 6th October, 1937, for an additional sum of Rs. 6,411-11-7 with interest at 6 per cent. per annum, and another sum of Rs. 1,629-9-9 for costs. It cannot be disputed that the amount due under the decree was more than Rs. 10,750 by the time when the mortgage came to be executed. The learned Advocate for the respondents contended that a sum of Rs. 1,750 had been paid under the decree sometime before the appellant's husband advanced monies on the mortgage. There is no satisfactory evidence about it. But it is unnecessary to investigate the question, as the balance of the amount due under the decree on the date of mortgage Exhibit A-1 would very nearly come to the amount lent thereunder. The learned Subordinate Judge found that, out of the sum of Rs. 10,750, the mortgagor would have utilised only a sum of Rs. 3,750 for the discharge of the liability under the decree in O.S. No. 35 of 1937, and that the balance would have been utilised in connection with the bus service. There is however no evidence for coming to the conclusion that the major portion of the money was utilised for the bus service. There is no proof either that the entire money went in actual discharge of the liability under the decree. The case for the appellant rests not on the ground that the mortgage money was in fact applied to discharge an antecedent liability, but on the ground that the creditor made *bona fide* enquiries before he lent the money and was satisfied about the existence of an antecedent debt sufficient very nearly to exhaust the amount lent. According to the appellant, the loan was advanced after making *bona fide* enquiries regarding the existence of an antecedent debt, namely, that under the decree in O.S. No. 35 of 1937. In support of that case, Exhibit A-8, a certified copy of an extract from the suit register in O.S. No. 35 of 1937 was filed, and the mortgagee gave evidence as P.W. 1. He stated that the loan under the mortgage was advanced for paying the decree and that he made due enquiries as to the existence of that liability. Nothing was suggested in the cross-examination to discredit the testimony. It was argued on behalf of the respondent that as there was no evidence or even a recital in Exhibit A-1 as to the exact amount which went in discharge of the respective purposes, it must be held that the appellant had failed to prove how much of the loan was for binding purposes. But the question in the present case is not as to the extent of the loan which is supported by necessity but whether the lender was satisfied after *bona fide* enquiry that the amount was required to pay off an antecedent debt of the father. We are satisfied on the evidence that the mortgagee made sufficient enquiries in regard to the existence of a decree against the first respondent in O.S. No. 35 of 1937.

That decree showed that the amount was very nearly equal to the amount advanced under the mortgage. Thereafter it was unnecessary for him to ascertain what exactly was the amount that was intended to be utilised for the bus service, as he would have been satisfied that almost the entire amount to be borrowed would have to go for discharge of the decree. The recitals in Exhibit A-1 show that there was a representation that there was a debt to be paid by him, and the enquiries revealed that the debt for the discharge of which the 1st respondent borrowed under Exhibit A-1 was in a sum very nearly equal to the amount lent. The mortgagee should have been satisfied that the amount of the mortgage was for the discharge of an antecedent debt of the 1st respondent.

The question to be considered is whether the lender could enforce the mortgage as against the sons of the 1st respondent by reason of the fact that he made *bona fide* enquiries and was satisfied as to the existence of the antecedent debt for the discharge of which the amount under the mortgage was ostensibly borrowed, he being not bound to see to the actual application of the money. The learned Subordinate Judge held that a lender or alienee would be protected by *bona fide* enquiry only in a case, where it was represented that the monies were required for a necessity of the family, and that the rule would not apply to a case, where liability was sought to be fastened on the theory of pious obligation. This view of the law was sought to be supported before us on behalf of the respondents.

Mr. R. Viswanathan, appearing for the respondents, contended that where an alienation of joint family properties by a Hindu father was sought to be justified not on the ground of any necessity but by the reason of the exercise of a power vested in the father to alienate the properties for the discharge of his personal debts, there should be an actual discharge of the debts, and the alienees would not be absolved by the mere evidence that he made *bona fide* enquiries, and was satisfied about the existence of the debts. He contended that the principle on which alienation of joint family properties was justified on grounds of necessity was on the ground of an implied agency of the manager or father, and that when he purported to act as a manager he would be deemed to be a person in ostensible authority, and if the alienee made *bona fide* enquiries, the members of the family should be held bound by principle analogous to estoppel. On the other hand, the principle underlying the power of the father to validly alienate family property for the discharge of his debts was based on the pious duty of the son to relieve him of his debts and save him from the purgatory which would await if he died with his monetory obligations undischarged. Pursuing this line, it was contended that where an antecedent debt was not actually discharged, the father would not be saved, and there would be no justification for the alienation. It was said that actual discharge of the debt would be necessary and would be the consideration for the sale of the son's share, and a mere *bona fide* enquiry could not support the alienation, as there would be no consideration for the sale. We cannot agree with this contention. The validity of an alienation of joint family property in a case where the alienee proved that he made *bona fide* enquiries as to the existence of necessity is not based on any theory of ostensible authority. An alienation by the father to discharge his antecedent debts is by virtue of a power vested in him to alienate in certain circumstances, and not for the reason that there would be sufficient consideration from the point of view of his sons. In either case it is a power vested in the manager or father to lawfully alienate family property if certain circumstances exist. The alienee has to prove that those circumstances existed in order to justify the alienation. It is not always that he would be able to do so. In *Hanuman Prasad's case*[1], Lord Justice Knight Bruce observed :

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money. The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Thus, the rule as to enquiry is not based on any theory of agency, or there being consideration to the person whose interests in the family property is alienated but on the inability of the lender or alienee to control the disposition of the money once it leaves his hands. On principle we do not see how that rule would not or could not apply to the case of an antecedent debt.

But in the actual application of the rule between a case of necessity and a case of antecedent debt there will be a difference. In the former case the existence of necessity would itself be a matter of representation and enquiry (*e.g.*, marriage of a coparcener) and if a *bona fide* lender satisfied himself as to the existence of necessity, it would not be not necessary that the necessity should have actually existed (that is, the marriage need not have been performed). But in the case of an antecedent debt, the existence of debt should be proved, as, otherwise, it would not be held that the enquiry was full or *bona fide*.

The learned advocate for the respondents relied on the decision in *Lakshmanaswami* v. *Raghavacharlu*[2] as supporting his contention that mere *bona fide* of the len-

1. (1856) 6 M.I.A. 393, 424. 2. (1943) 1 M.L.J. 104 : I.L.R. (1943) Mad. 717.

der could not avail him in the absence of actual discharge of an antecedent debt. In that case the father of a joint Hindu family borrowed monies for the needs of his concubine. A question arose as to the liability of the sons in regard to such debts. The learned Judges observed, at page 725 :

"But when he (father) borrows for his own private purposes without any representation, express or implied, that he is borrowing for the family, he does an act on behalf of his family, and no question of his acting beyond the scope of his authority can arise and no question, therefore, of any *bona fide* lending. The Hindu Law no doubt casts a pious obligation on the son to discharge his father's debts except those falling within certain categories which are usually referred to as illegal or immoral. But this obligation, it is well to remember, was based on the religious duty of the son to relieve the father from the evil consequences arising from the non-payment of his debts and was not designed for the benefit or the protection of his creditors ; and, similarly, an examination of the Smrithi texts relating to the excepted categories shows that they are based solely on the impropriety of the father's conduct in contracting the debt, and have no reference to the propriety or otherwise of the creditor's conduct in advancing the loan. The position, therefore, is that, if the father's debt is free from taint, a pious duty is laid on the son to rescue the father from the penalties of indebtedness, the resulting advantage to the creditor being purely incidental, if, on the other hand, the debt originates in the father's misconduct the pious duty ceases to operate and the son is not bound to pay the debt, however *bona fide* the creditor may have been in advancing the loan ".

It is apparent that that case was concerned with an avyavaharika debt, and the learned Judges held that once it was proved that the debt incurred by the father was an avyavaharika debt, no amount of *bona fides* on the part of the creditor would entitle him to sue the son in respect of the obligation. An avyavaharika debt is taken out of the categories of debts for which a son could be held to be liable on the theory of pious obligation. So, an enquiry could not convert an illegal debt into a legal one. This would be so even if he was misled by such enquiry into thinking that the debt was not an avyavaharika debt, for the simple reason that if it were an avyavaharika debt no question of liability of the son will at all arise, and there would be no scope for the application of the rule as to *bona fide* enquiry. Further, enquiry, if properly conducted, (in which case alone it could be said to be *bona fide*) would have revealed that the debt was a tainted one for which the sons would not be liable. The decision in *Lakshmanaswami* v. *Raghavachary*[1] was not concerned with avyavaharika debt which could justify an alienation. In our opinion, in the case of a father's debt not tainted with illegality or immorality, the question of *bona fides* of the lender would be material, if it were found necessary to justify an alienation on the basis of a *bona fide* enquiry as to the existence of the antecedent debt.

The rule as to enquiry found statutory recognition in section 38 of the Transfer of Property Act. That provision has been made applicable to the Hindus. Section 38 states :

"Where any person, authorised only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and the other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith ".

One of the circumstances, which would entitle a Hindu father to sell a property, is discharge of his own debts. It follows that an alienation by a Hindu father for payment of antecedent debt could be justified if the transferee proved that the debt existed and that after an honest and proper enquiry he was satisfied that monies were required for the discharge of the same.

In *Chandra Deo Singh* v. *Mata Prasad*[2] it was held that a creditor, suing the sons on a mortgage executed by their father in respect of joint family properties, would be bound to prove that the loan secured under the mortgage was taken to satisfy an antecedent debt, or was justified by some family necessity, or at least that he had, before advancing the loan, made an enquiry which reasonably led to the belief that the loan was required for family's necessity or to pay off antecedent debts.

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1. (1943) 1 M.L.J. 104 : I.L.R. (1943) Mad. 717.
2. (1909) I.L.R. 31 All. 176.

In *Sahib Singh* v. *Girdhari Lal*[1], it was held that, where a vendee had, before taking the sale deed, made reasonable and sufficient enquiries to satisfy himself that antecedent debts were existing, and there was necessity to transfer the property in order to pay off the debts, there was no further need for him to prove how the money advanced by him was actually applied to discharge those debts.

This question was considered by Venkatramana Rao, J., in *Rama Rao* v. *Venkata Subbayya*[2]. The learned Judge held that all that was necessary to prove in such a case would be the fact of debt subsisting against the father at the time of alienation, and that the belief in the representation that money was needed for the discharge of such debts would be quite sufficient to justify the alienation. In that case proof of existence of such a debt was given, and it was held that the alienation was valid.

In the present case, the existence of antecedent debt has been proved. There was a representation by the mortgagor that monies borrowed under the mortgage were required for the purpose of paying off that debt ; the mortgagee did not merely rely upon the representation made by the mortgagor, but made *bona fide* enquiries and satisfied himself that the money was required for discharge of the antecedent debt. Under those circumstances, we do not consider that it was further necessary for the mortgagee to see to the application of the money. He, having proved to have made *bona fide* enquiries as to the existence of the antecedent debt for discharge of which the monies were borrowed ostensibly, would be protected, notwithstanding the fact that the monies borrowed were not proved to have been actually utilised for the discharge of the entire amount due under the decree. We cannot agree with the conclusion arrived at by the learned Subordinate Judge that protection, given to a *bona fide* alienee who satisfied himself as to the existence of necessity, would not be available to the case of one whose monies were ostensibly required for the discharge of antecedent debts of the father, but such monies were not so utilised. Respondents 2 and 3 would, therefore, be liable for the entire amount due under the mortgage. The appellant would be entitled to a mortgage decree for the amount of Rs. 18,600-7-9 with subsequent interest against the interests of the sons in the Ammampatti lands. Time for redemption 3 months.

This appeal is allowed with costs which will be included in the mortgage decree.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Appellant**

v.

Sampath Kumar .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 345—Period of three years—How computed—Prosecution commenced within the period but proceedings stopped under section 249 of the Code of Criminal Procedure (V of 1898)—If could be re-opened after the expiry of the period of three years.

Criminal Procedure Code (V of 1898), section 249—Proceedings stopped under and re-opened later—Effect of.

What section 345 of the Madras District Municipalities Act requires is that no prosecution for non-payment of tax shall be commenced after the expiration of three years when the prosecution might first have been commenced. Where a prosecution was commenced within the time but proceedings were stopped under section 249 of the Criminal Procedure Code and is subsequently re-opened the mere fact that the period of three years has elapsed in the meantime will not bar prosecution under section 345 of the Municipalities Act.

Where a prosecution stopped under section 249 of the Criminal Procedure Code is re-opened, it is not as if the prosecution commences only after the re-opening but it is only continuing the original prosecution launched.

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1. (1923) I.L.R. 45 All. 576.
2. A.I.R. 1937 Mad. 274.

* Criminal Appeal No. 489 of 1959. 10th November, 1959.
(19th Kartika—1881 Sakah).

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sub-Magistrate (Judicial) No. I, Tiruchirapalli, in C.C. No. 946 of 1959 on his file.

M. Narayanamurthy, for the Public Prosecutor (*P. S. Kailasam*), for Appellant.

P. Sharafuddin, M. R. Krishnan and *S. M. Amjad Nainar*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the State against the acquittal of the respondent in C.C. No. 946 of 1959 on the file of the Sub-Magistrate, No. I (*J*) Tiruchirapalli.

The Municipal Commissioner, Srirangam Municipality, filed a complaint against the respondent herein for non-payment of house-tax for the years 1951-52, 1952-53 and 1953-54. The complaint was first laid before the Court of Bench Magistrates, Srirangam, who took the case on file and issued summons for appearance of the accused. In spite of several summonses and even bailable warrants the appearance of the accused could not be secured. Finally, it is stated, the proceedings were stopped under section 249, Criminal Procedure Code, by the District Magistrate, Tiruchirapalli, in his order L. Dis. No. 10667 of 1954 dated 30th November, 1954.

While the case was thus pending, on 16th October, 1958, the Municipal Commissioner applied to the Court of Bench of Magistrates to re-open the case, apparently because the accused was available. Summons was issued to the accused who, after service, appeared in Court. He then raised objections to the trial of the case, the objections involving questions of law. The District Magistrate transferred the case to the file of the Sub-Magistrate, for the reason that the questions of law involved in the case were such that it should be heard and disposed of by a Stipendiary Magistrate.

It is alleged by the State that in the Court of the Sub-Magistrate, when objections were raised by the accused, notice was not sent to the Commissioner, and that he was not heard regarding these objections. The records are not quite clear on the subject, *i.e.*, as to whether notice was sent to the Commissioner or not. It is pointed out by the learned Public Prosecutor that the order itself furnishes internal evidence that the Commissioner could not have been present because there appears to be no reference to any answer of the Commissioner to the argument of the accused ; and, if the Commissioner was present, certainly, the would have replied to the objections and the reply would have been referred to. But this, by itself, seems to be a slender ground on which we can say that no notice was sent. However, I am a not prepared to reverse this acquittal on that ground.

The main ground on which the Magistrate has acquitted the accused is that the prosecution is barred under section 345 of the District Municipalities Act. Section 345 of this Act is in these terms :

"No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the municipal council under this Act after the expiration of a period of three years from the date on which distraint might first have been made, a suit might first have been instituted, or a prosecution might first have been commenced, as the case may be, in respect of such sum."

Now, this complaint by the municipality was filed on 22nd February, 1954. This is well within three years when the tax will be due for 1951-1952, because the tax for the first half of the year 1951-1952 will have to be paid before the end of that first half year, *i.e.*, before the 30th of September, 1952. The prosecution having been launched on 22nd February, 1954, it is well within three years of the time when the amount of the tax will become due, or when the prosecution should have been launched. In respect of the other years, the prosecution is therefore, not barred, it being for sums due for later periods. The Magistrate has gone under the impression that the proceedings were wrongly stayed by the District Magistrate under section 249, Criminal Procedure Code and the case having been re-opened on 16th

October, 1958, the proceedings are barred by limitation. The learned Magistrate has certainly committed an error in thinking that the prosecution must be considered to have originated only on 16th October, 1958. What the section requires is that no prosecution shall be commenced after the expiration of a period of three years. Here, the prosecution has already commenced on 22nd February, 1954. This is well within three years, and the proceedings were pending and they were stopped. When the prosecution is re-opened, it is not as if the prosecution was commenced only after the re-opening ; it only continued. The Magistrate was clearly in error in holding that the present proceedings were barred under section 345 of the Act. On this ground the acquittal has got to be set aside.

One other ground also on which the learned Magistrate relies is the misjoinder of charges. It was open to the Magistrate to split the case into three cases, *i.e.*, one for 1951-1952, the other, for 1952-1953 and the third for 1953-1954. There was no need even to wait for the Commissioner to amend the complaint. The Magistrate himself can split up the case and try the cases if he is satisfied that there is misjoinder of charges. Instead of adopting that procedure the Magistrate was clearly wrong in acquitting the accused on the ground of misjoinder of charges.

The main grounds on which the learned Magistrate has acquitted the accused are unsustainable and as the cases related to taxes due to the municipality, it seems necessary that not only should the acquittal be set aside but there should be a re-trial of this case.

The acquittal is, therefore, set aside and the case is remanded to the Court of the Sub-Magistrate, other than the one who tried the case. The District Magistrate will effect the necessary transfer and due notice will be given to the Commissioner and the accused will have his usual right to raise such objections as he can have to the case but the case will be split up into three and will be tried as three separate cases. The appeal is allowed.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction].

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Management of Express Newspapers (Private) Limited, Proprietor of Dinamani Press, Madurai .. *Petitioner**

v.

The Industrial Tribunal, Madras, having its office at B-1, Police Station, Madras-1 and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—Tribunal under—Jurisdiction of in matters relating to dismissal for misconduct.

In matters of discipline such as the dismissal of a workman for misconduct it is not for the tribunal under the Industrial Disputes Act to take evidence and decide for itself whether the workman in question merited dismissal. All that it could decide is whether there was want of good faith on the part of the management or whether there was any basic error or violation of principles of natural justice. It is impossible in an establishment to define exhaustively all the duties which a particular workman is to do. A compositor in a press will be under an obligation to do the work of 'joining' which is part of his legitimate duties.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 59 of 1958 dated 29th December, 1959, on the file of the Industrial Tribunal, Madras and quash the Award, dated 29th December, 1959 and made therein.

M. R. Narayanaswami, for Petitioner.

S. Mohan Kumaramangalam, *K. V. Sankaran* and *S. Ramaswami*, for Respondents.

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* W.P. No. 184 of 1959. 21st July, 1959. (30th Asadha 1881—Saka).

The Court made the following

ORDER :—On 24th July, 1958, eight employees of the Dinamani Press in Madurai refused to do some work which was allotted to them. Thereupon the management framed charges against them, obtained their explanation, held an enquiry and eventually dismissed them. An industrial dispute was raised and on 16th October, 1958, the Government of Madras referred two questions for adjudication by the Industrial Tribunal, Madras. With the first of these questions we are not concerned. The second question was whether the termination of the services of the eight workmen who had been dismissed by the Dinamani Press was justified, and if not, what relief the dismissed workers were entitled to. The Tribunal found that the dismissal of the first four was justified and that they were not entitled to any relief. So far as individuals 5 to 8 were concerned, the Tribunal held that their dismissal was wrongful and that they should be reinstated with one-half of their back wages. The management of the Dinamani Press has come to this Court for the issue of an appropriate writ to quash this order of the Tribunal.

The first of the four employees we are concerned with is called Raju. The charge against him was that after doing "joining work" from 2-30 to 6-30 in the afternoon of 24th July, 1958, he suddenly refused to do that work after 7-30 and that thereby he deliberately delayed the paging of the papers and that he disobeyed the Manager's order in that regard. His explanation was in these terms :—

"As you had asked me to do joining work in addition to the composing work which I was doing till now, but you refused to carry out your assurance that in consideration therefor, you would give me enhancement of salary. I did only the composing work which had to be done by me (normally) and I did not refuse to do my work. Further, I have not caused any kind of loss to this concern. I hereby make it known that I have not refused to do the composing work allotted to me by the Manager. The delay on account of the failure to do joining work was not due to me. I am not a joiner."

The second individual we are concerned with is a person called Ayyavoo. The charge against him was that when Raju suddenly refused to do the work which he had been normally doing, the foreman asked him to attend to that work so that the paper might not be delayed and that he disobeyed the directions of both the manager and the foreman. The explanation of Ayyavoo is word for word the same as that of Raju though it will be perceived that the charge against him was entirely different.

The third individual we are concerned with is called Paul Raju and the charge against him was similar to that framed against Ayyavoo. His explanation was word for word identical with that submitted by Raju and Ayyavoo.

The fourth individual we are concerned with is called Murugan and the charge against him was similar to that framed against Ayyavoo and Paul Raju. His explanation too was word for word identical with that of the other three.

As already stated the management refused to accept the explanation of these persons and eventually dismissed them. It may be explained here that all these four individuals have been described as compositors. The duties of compositors were thus explained by M.W. 1 who was examined before the Industrial Tribunal :

"I was branch manager of Dinamani Press since 1951. I am now in the Madras Office since August this year. Since 1951, the composing was done by hand ; sometime later, monotype machine was introduced ; most of the composing work was done by the machine ; but even then, the advertisements were composed by hand. There were compositors even after the introduction of monotype machine. Before the introduction of monotype machine, the work of compositors consisted in :

(*a*) composing ;

taking rough proof to find out mistakes, to carry out corrections.

(*b*) Then, imposing and page-making ; page making is imposing.

(*c*) The distribution of types in the respective galley.

After the introduction of monotype machine, their duties were :

(*a*) to take proof of the machine composing and carrying out corrections ;

(*b*) joining, imposing and page-making,

(*c*) composing for advertisement section.

The eight persons involved in this reference were doing the imposing work prior to 24th July, 1958, one worker for 4 years and the rest for 1½ years or 2 years before that date."

Reference may be made at this stage to the evidence of W.W. 1 before the Tribunal. He deposed in cross-examination:

"I am one of the 8 dismissed workers. A compositor must necessarily know imposing work. I know imposing work as every compositor knows. More wages are paid for imposing work."

It was explained to me that what is called the process of composing consists of several stages of work. In the first stage a key-board is worked and certain spools are turned out. These spools are fed into a machine which sets the matter in type. A proof-reader corrects them and after the corrections are made the various pieces are "joined" so as to form columns and those columns are arranged in the form of a page and that is called page-making or imposing.

Before the Industrial Tribunal the case of the workers was:

"The 'Dinamani' compositors were requested to do the imposing work (page-making in addition to their composing work and promising them to give additional pay during revise of the scale of pay (*sic*). They also agreed and were doing the imposing work in addition to their composing work for the last one and half years."

In other words they were doing "imposing" work because they had been promised extra pay.

The Tribunal found:-

"There is no satisfactory evidence that the Manager made any such promise. Examined as a witness by the management; the Manager denied having made any such promise. Even in the notice Exhibit W-1 given by the workers in December, 1957, demanding additional wages for doing the imposing work, there is no reference to the Manager having ever promised to pay extra remuneration for this work."

Nevertheless the Tribunal went on to consider the question whether 'imposing' work was part of the duty of the compositors and it reached the conclusion that it was not. It therefore held:

"That being so, they had every reason and justification to think that it was not part of their duty as compositors and refuse to do it. They did not by any standard of justice merit dismissal."

Mr. Narayanaswamy, the learned Advocate for the petitioners, pointed out that the Order of the Tribunal is vitiated by a number of circumstances. The limits of the jurisdiction of the Tribunal are clearly pointed out by the Supreme Court in *Messrs. Indian Iron and Steel Co.* v. *Their Workmen*[1]. At page 138, their Lordships observed:

"Undoubtedly, the management of a concern has power to direct its own internal administration and discipline; but the power is not unlimited and when a dispute arises, Industrial Tribunals have been given the power to see whether the termination of service of a workman is justified and to give appropriate relief. In cases of dismissal on misconduct, the Tribunal does not, however, act as a Court of appeal and substitute its own judgment for that of the management. It will interfere (i) when there is a want of good faith, (ii) when there is victimisation or unfair labour practice, (iii) when the management has been guilty of a basic error or violation of a principle of natural justice and (iv) when on the materials, the finding is completely baseless or perverse."

The position has been restated in *Mckenzie Co.* v. *Its Workmen*[2]. At page 674 it is observed:

"It is for the management to determine what constitutes major misconduct within its standing orders sufficient to merit dismissal of a workman but in determining such misconduct it must have facts upon which to base its conclusions and it must act in good faith without caprice or discrimination and without motives of vindictiveness, intimidation or resorting to unfair labour practice and there must be no infraction of the accepted rules of natural justice, When the management does not have facts from which it can conclude misconduct its judgment cannot be questioned provided the above mentioned principles are not violated. But in the absence of these facts or in case of violation of the principles set out above its position is untenable."

What the Tribunal did in this case was to take evidence for itself and decide whether the workers in question merited dismissal. In other words, it constituted itself as a Tribunal of first instance in disciplinary matters. This it was not entitled to do. All that it could consider was, whether there was want of good faith on the

1. (1958) S.C.J. 285 : (1958) M.L.J. (Crl.) 266 : A.I.R. 1958 S.C. 130.

2. (1959) M.L.J. (Crl.) 461 : 1959 S.C.J. 670.

part of the management, whether there had been victimisation or whether any unfair labour practice was involved in their dismissal, whether the management was guilty of any basic error in dealing with the case of the workers, whether they violated any principle of natural justice or whether the finding was completely baseless or perverse. But, that is not what the Tribunal sought to do or did.

The next observation to make is that the Tribunal completely misdirected itself as regards the question it had to decide. In paragraph 7 it formulated the question for its decision in these terms :

"However, the question remains whether the imposing work was part of the duty of the compositors."

Now, that question did not arise at all. The facts were that Raju who had been doing "joining work" for two years and more before that date suddenly refused to do joining work and then one after another the other persons were called upon to work in his place and complete the work, but they refused to do. No question of anybody being called upon to do 'imposing work.' arose at all. I would further remark that even if they had been called upon to do imposing work the compositors were bound to do it because as M.W. 1 explained it was part of the duties of a compositor to do so It is not as though any one of these persons was called upon to do some work which would not be properly assigned to him. Besides they had done this work before. M.W. 1 deposed :

"No. 5 Raju was doing only joiner work, after doing composing work for some time ; Nos. 6, 7, 8 (Ayyavoo, Paul Raju, Murugan) were doing composing work ; when the routine imposing worker was absent on any day, one of these 3 workers will be asked to do the imposing work ". . . . . . These 7 persons Nos. 2 to 7 were trained to do imposing work only after the introduction of monotype machine."

The work of "joining" which these persons were asked to do formed part of the legitimate duties of compositors and when required to do that work by proper authority, they were under an obligation to do it.

The Tribunal observed in paragraph 8 of its order :

"The refusal on their part to do that work, which the evidence of the manager himself would show, was not part of their duty would not amount to misconduct. In any case, there is nothing in writing clearly defining the duties of the compositors. That cannot be left to be dictated by the management. These four workers never did the imposing work as admitted by the manager himself."

One obvious mistake which the Tribunal made here and which I have already referred to, is that throughout the question of any of these persons being required to do "imposing" work did not arise at all. They were required to do "joining" work. In the second place, the Tribunal ignored the fact that it is impossible to define in writing all the duties of every individual in an establishment of any size. The Tribunal also overlooked the fact that the Manager, M.W.1, had given clear evidence to say that the duties of a compositor include joining, imposing and page-making. I would make one further observation. If the view of the Tribunal in this respect were right it would not be permissible for the Collector of a District to ask a clerk who had been dealing with cattle pounds for instance to deal with Land Acquisition cases or to ask a clerk who had been attending to Village Officers to attend to correspondence arising with Municipalities. The duties of everyone of these individuals will have to be defined in writing and there can be no deviation therefrom. The requirement of the Tribunal that every single matter should be clearly reduced to writing is an impracticable one.

It seems to me that the order complained of is clearly erroneous and must be set aside. This petition is, therefore, allowed. There will be no order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE RAMASWAMI.

S. Kandaswami .. *Appellant**

v.

S. B. Adityan and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), *section* 90 (1) *and* (2)—*Trial of election petition—In the nature of quasi-criminal proceedings—Allegations of corrupt practice—Burden of proof is on the petitioner.*

Though the procedure followed in enquiries in election petitions is civil in form, yet the trial is a quasi-criminal trial and not a civil trial, especially when the results and consequences like penalties, fines and disqualification, that follow from the decision in election petitions are kept in view. The standard of proof in an election enquiry is the same as could be achieved in a criminal trial. The onus of establishing a corrupt practice beyond reasonable doubt will rest heavily on the petitioner. It is not open for the petitioner to contend that if he has proved a *prima facie* case against the respondent it is for the respondent to rebut the *prima facie* case made against him.

Appeal against the Order of the Election Tribunal, Tirunelveli (District Judge, Kanyakumari at Nagercoil) dated 9th February, 1959 and made in Election Petition No. 98 of 1957.

S. Mohan Kumaramangalam, V. V. Raghavan, T. Martin and *S. Ramamurthi*, for Appellant.

S. V. Gopalakrishna Ayyar and *K. N. Srinivasan*, for Respondents.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—This is an appeal against the order of the learned District Judge of Kanyakumari at Nagercoil acting as the Election Tribunal, Tirunelveli, in Election Petition No. 98 of 1957. The petitioner, who is the appellant before us, was one Kandaswami. He was a contesting candidate for the election to the Madras Legislative Assembly from the Sattankulam constituency. In the election he was defeated and the 1st respondent was declared elected to the said constituency. Thereupon the appellant filed an election petition before the said Election Tribunal questioning the validity of the election of the 1st respondent and praying that the election of the 1st respondent to the Madras Legislative Assembly from the Sattankulam constituency should be declared void and that he should be paid the costs of the petition.

Though the petitioner sought the election of the 1st respondent to be declared void as required by the rules, the 2nd, 3rd and 4th respondents were made parties, as all of them were either contesting candidates or candidates, who retired from the contest. As a matter of fact, while respondents 1 to 3 were the contesting candidates for the said election, the 4th respondent and two others are said to have been candidates, who either retired or withdrew from the election. The 4th respondent is said to have retired from the contest, while P.W. 10 is said to have withdrawn his nomination to the election.

It is not necessary for us in this appeal to go into the elaborate details of the various facts relating to the election in question. We think it sufficient to say that at the election for the said Sattankulam constituency, which was held on the 4th March, 1957, the 1st respondent secured 33,636 votes as against the petitioner, who polled only 22,429 votes. The 3rd respondent is said to have polled only 1,115 votes and the 2nd respondent 1,083 votes only. Consequently, the 1st respondent was declared elected by the Returning Officer as a result of the counting of the votes.

In the petition filed by the appellant, several acts of bribery and corrupt practices coming within the scope of section 123 (1) of the Act XLIII of 1951 were alleged by the appellant. These allegations have been elaborately referred to by the learned Election Tribunal in its order, dated 9th February, 1959. The petitioner also alleged against the 1st respondent and his agent that they had con-

* A.A.O. No. 61 of 1959. 18th September, 1959.

travened section 77 of the said Act XLIII of 1951 in regard to expenditure incurred in connection with the election.

The 1st respondent in his written statement contested the truth and validity on the various contentions raised by the petitioner and contended that his electiof was not liable to be set aside and that the petition had to be dismissed.

Before the Tribunal respondents 2 and 3 remained *ex parte*. The 4th respondent, however, filed a written statement supporting the case of the petitioner and stating that he was promised a sum of Rs. 7,500 if he would retire from the election but was actually paid only Rs. 500 and that the balance was promised to be paid later and that out of this balance the election agent of the 1st respondent paid him a further sum of Rs.2,000 and that the balance of Rs.5,000 remained unpaid.

On the petition and the counter-statements filed by the 1st and the 4th respondents, the learned Election Tribunal framed as many as ten issues with various sub-divisions to some of the said issues and taking into consideration both the oral and documentary evidence, came to the conclusion that the petitioner failed to prove his case and dismissed the petition. For reasons given in paragraph 209 the learned Election Tribunal did not award costs to the 1st respondent which he claimed he was entitled to as a consequence of the dsmissal of the petition.

The petitioner has therefore preferred this appeal, while the 1st respondent has preferred the memorandum of cross-objections against the order as to costs.

Both the appeal and the memorandum of cross-objections have been ably argued before us by learned counsel appearing on both sides. Mr.Mohan Kumaramangalam for the petitioner has confined his arguments to three points on the whole and did not choose to press the other points urged in the petition. The points on which he has concentrated in the course of the arguments are (1) that the 1st respondent and his election agent bribed the 4th respondent to retire from the contest to the election, (2) that the 1st respondent and his election agent paid a sum of Rs.10,000 to one Sri M.R. Meganathan, a candidate for the Sattankulam and Trichengode constituency and induced him to withdraw from thes aid candidature at the said election, and (3) that the 1st respondent and his election agent incurred an unauthorised expenditure in contravention of section 77 of the Act XLIII of 1951, that the return of election expenses filed by the 1st respondent did not disclose the actual nature or the correct extent of the expenses incurred by him and that if the expenses actually incurred by him were to be added on to the expenses disclosed by the 1st respondent, the total expenditure would exceed the minimum prescribed by law. The 1st and the 2nd of the points urged by the learned counsel for the appellant are covered by issues 2 (*a*) and 2 (*b*). The third point is covered by Issues 8 (*a*) and 8 (*b*). All these issues have been dealt with by the Election Tribunal in paragraphs 77 to 209 of its order.

It has been urged by the learned counsel for the appellan that from the beginning of the election, the 1st respondent was anxious that he should secure 'Elephant' as his symbol at the election. He had this symbol in a previous election in which he was, however, defeated. But since the symbol had become popular and associated with the 1st respondent, it was his object to see that the 'Elephant' symbol was not secured by any other rival candidates. But actually, the 4th respondent had applied for the 'Elephant' symbol along with the 1st respondent. This conflict was resolved by casting of lots and the 4th respondent got the 'Elephant' symbol for himself, while the 1st respondent got only 'Cock' as his symbol. In addition to securing the 'Elephant' symbol, the learned counsel for the appellant also stated, that the 1st respondent was very keen on the 4th respondent not contesting against him in the said election. If the 4th respondent were out of the scene, he would not only be able to get his symbol but would also be spared serious contest. The allegation is that with a view to secure this object, on 18th February, 1957, R.W. 3 and P.W. 8 went to the house of P.W. 1, the 4th respondent, to persuade him to retire from the contest. After negotiations, it was settled that the 4th respondent should be paid a sum of Rs. 7,500 and Rs. 500 was paid then and there and the balance was promised to be paid after the retirement was effected. It may be mentioned at this

stage, that while the date for the nomination for the said election was the 29th January, 1957 and the scrutiny was fixed for the 1st of February, 1957, the withdrawal was to take place on the 4th February, 1957. In addition to withdrawal, there is also a further step that is available to the candidates and that is retirement from the contest. The date for such retirement from the contest at the election was fixed for 22nd February, 1957, while the actual date of polling was fixed for 4th March, 1957.

In this contest it is alleged that on 19th February, 1957, P.W. 1 presented his retirement letter to the Revenue Divisional Officer at Tiruchendoor. He was, however, asked to go to Tuticorin and present the same to the Revenue Divisional Officer, and accordingly the 4th respondent presented his retirement letter on 20th February, 1957 and thereby retired from the contest. On the same day, it is alleged, P.W. 1, the 4th respondent, went to the village of the 1st respondent to receive the balance of Rs. 7,000 stipulated for his retirement. The 1st respondent did not pay the balance and the 4th respondent met the 1st respondent on 23rd February, 1957, when the 1st respondent is said to have suggested to the 4th respondent that he might go to Tahsildar's office and get him a few electoral rolls, which, it is stated, were available to the candidates at concessional rates. It is urged that the 1st respondent also gave P.W. 1 a letter addressed to his brother-in-law, one Ganapathy Nadar of Tiruchendoor, asking him to help P.W. 1 to get copies of the voters' list from the Tahsildar at a concessional rate of Rs. 22 per copy, as against the normal rate of Rs. 40 for non-candidates. P.W. 1 did not find Ganapathy Nadar at Tiruchendoor and he took upon himself the responsibility to approach the Tahsildar directly and asked for the lists. He was told that since he had retired from the contest, he was not entitled to any copy at concessional rates. The letter written by the 1st respondent to his brother-in-law, Ganapathy Nadar, and the addressed cover are both marked as Exhibits A-2 and A-3 respectively, before the Tribunal.

The further story unfolded on behalf of the appellant is that the 4th respondent tried to meet the 1st respondent to secure the balance of Rs. 7,000 still payable to him, but he did not succeed in his attempts. Thereupon on 26th February, 1957, a notice Exhibit A-4 was sent by the 4th respondent to the 1st respondent, demanding the payment of the balance of Rs. 7,000. It is quite evident and latter admitted that this Exhibit A-4 had been drafted by a lawyer but was actually signed by the 4th respondent and sent direct. This demand notice stated that a sum of Rs. 7,500 was fixed to be paid towards the election expenses of the 4th respondent, which he had incurred prior to 20th February, 1957 and that Rs. 500 was paid thereof and that the balance was due. In case of default of payment, the notice stated that the 4th respondent would take proper steps with the Election Commissioner for setting aside the election, that the dishonest act of the 1st respondent would be published in the newspapers and that propaganda would be made against him exposing him and his dishonest act and that action would also be taken in a civil Court to recover the balance. R.W. 3, who is no other than the brother and the election agent of the 1st respondent and also an advocate by profession, replied to this notice on 20th March, 1957 and this reply is marked as Exhibit A-6. In this reply, R.W. 3 on behalf of his principal, the 1st respondent, denied every allegation contained in the said Exhibit A-4. Thereafter a notice was caused to be sent by the 4th respondent this time through his lawyer, namely Vaikuntamurthy, who had remained behind the scene at the earlier stage, when Exhibit A-4 was despatched to the 1st respondent by the 4th respondent. In this notice Exhibit B-1, dated 10th April, 1957, the lawyer alleged that the 1st respondent was very anxious that the 4th respondent, should retire from the contest that the 'Elephant' symbol should be released, that the 1st respondent promised in the presence of R.W. 3 to pay a sum of Rs. 7,500 with the object of inducing the 4th respondent to withdraw from the candidature and that immediately a sum of Rs. 500 was paid and that the balance was promised to be paid to the 4th respondent on his filing his petition for his retirement with the Returning Officer at Tuticorin. Various other allegations are also made in this notice. It becomes relevant to note in

this connection as to how exactly a professional lawyer, like Vaikuntamurthy, could have sent the notice Exhibit B-1 in the terms contained therein. It is, howeve, pointed out by the learned counsel for the appellant that at the time the notice was sent, the position of law was that the receiving of a bribe in elections was not an offence but only the giving of a bribe was made an offence under the People's Representation Act governing elections. In *Adityan* v. *Kandaswami*[1], it was also ruled that while the giving of a bribe in elections was an offence the receiving of a bribe was not such an offence. This state of law was, however, altered after these decisions by an amendment in 1959 of the People's Representation Act and at the present moment both the giving and the receiving of a bribe has been made a corrupt practice punishable under the law.

Exhibit B-1 evoked a reply in Exhibit B-2 from R.W. 3, which, again, was a categorical denial of the allegations made in Exhibit B-1. At this stage, it has to be mentioned that the 4th respondent P.W. 1 also caused a notice, dated 19th April, 1957, signed by himself and his advocate R.W. 11 to be sent to the appellant complaining that he was instigated and induced to send Exhibit A-4 on the understanding and assurance that if he were to abide by the directions of the appellant and his associates, they would pay him Rs. 500 and secure him a big sum from the 1st respondent and that, instead of getting any amount from him as promised and assured, he got only a notice from the brother of the 1st respondent, dated 20th March, 1957, Exhibit A-6, repudiating his claim for payment of any sum. This notice is marked as Exhibit A-7 and it also stated that a further notice sent to R.W. 3 in English was also of no avail and called upon the appellant that the sum of Rs. 500 promised by him should be paid immediately, failing which the amount would be collected through Court with costs. This notice was, however, disowned by P.W. 1 when he was in the witness-box. Thereafter, a further notice was sent by the 4th respondent through his lawyer Mr. Vaikuntamurthy to R.W. 3, the notice being signed by both, on 10th May, 1957, to the effect that a panchayat was held at the office of the advocate, Mr. Vaikuntamurthy, on 29th April, 1957, between himself and the 4th respondent, in the presence of one Abdul Wahab, not called in as a witness and another, that the panchayat decided that R.W. 3 should pay a sum of Rs. 7,500 to the 4th respondent, that upto the date of the notice he had received only Rs. 2,500 and that a sum of Rs. 5,000 was still due, that the said balance was not paid in spite of repeated demands, and that arrangement should be made for the payment of the balance within a week from the date of the receipt of the notice and that in default the law would be set in motion to recover the amount with costs. This notice is marked as Exhibit A-8 and is dated 10th May, 1957. The significant development that falls to be noticed in connection with this Exhibit A-8 is that there is an allegation that a total sum of Rs. 2,500 had been paid but it does not state as to when and were and by whom the sum of Rs. 2,000 was paid to the 4th respondent. It has also to be noted that this notice, as also Exhibits A-4 and B-1 are quite contrary to the contents found in Exhibit A-7. Exhibit A-9 is a reply given by R.W. 3, dated 24th May, 1957, denying the convening of the panchayat and the payment of any sum to the 4th respondent and also stating therein that two other persons mentioned in Exhibit A-8 might be the friends of the 4th respondent and that R.W. 3 had nothing to do with them. This is all the documentary evidence relied upon by the learned counsel for the appellant to prove that there was an inducement to the 4th respondent to withdraw from the contest, that there was a promise and an undertaking to pay as much as a sum of Rs. 7,500 that a part payment in the sum of Rs. 2,500 was made towards the said agreed amount, that in pursuance of the said undertaking by the 1st respondent to pay the said sum of Rs. 7,500 the 4th respondent withdrew from the contest and that such inducement or promise and payment of any sum was a corrupt practice resorted to by the 1st respondent which entitled the Tribunal to hold the 1st respondent's election void.

This documentary evidence was sought to be supported by the learned counsel for the appellant by the depositions of the 4th respondent figuring as P.W. 1 and another witness P.W. 8. P.W. 1 proved the several notices that passed between him and the 1st respondent and his brother and also spoke to the various events that are

1. (1958) 1 M.L.J. (S.C.) 61 : (1958) S.C.J. 1072.

said to have transpired between himself and the 1st respondent and his brother R.W. 3. P.W. 8 was called in to corroborate the payment of the sum of Rs. 500 and also the previous negotiations that are said to have been carried on prior to the 4th respondent's withdrawal from the contest.

As against the documents relied upon by the learned counsel for the appellant and the depositions of P.Ws. 1 and 8, the learned counsel for the 1st respondent relied upon the deposition of the 1st respondent as R.W. 1, R.W. 3 and that of R.W. 11, the advocate who sent Exhibit A-7 on behalf of the 4th respondent, P.W. 1. In addition to this, the learned counsel for the 1st respondent also relied upon the plea of *alibi* put forth by his client and the evidence in support thereof. It was contended on behalf of the 1st respondent his learned counsel that his client was away from Sattankulam on the relevant dates, when he is said to have met the 4th respondent or made promise or payments of the sum of Rs. 500 or Rs. 2,000 as alleged by the 4th respondent.

In so far as the *alibi* evidence is concerned, the learned counsel for the appellant argued that the evidence was not conclusive and that the 1st respondent should have produced more clinching evidence to prove the *alibi*, than what was actually adduced by him. He urged that the respondent should have produced convincing evidence about his travel to Madras and about his presence in Madras on the 18th and 19th February, and that the evidence actually produced did not rule out the possibility of another man having travelled in his place and another person having booked the trunk telephone call from Madras to Sattankulam on his behalf.

The learned Election Tribunal, however, accepted the appellant's case with regard to the motive of the 1st respondent to get the Elephant's symbol out of the contest and about the 1st respondent asking the 4th respondent to fetch the voters' list and disbelieved the evidence of R.W. 11 in regard to Exhibit A-7. The learned Tribunal, having found so much in favour of the appellant, however, accepted the *alibi* evidence adduced by the 1st respondent and held that the case of the appellant so far as the bribe offered to the 4th respondent was concerned, was not proved. The learned counsel attacked this finding of the learned Election Tribunal.

We have been taken through the entire evidence, both documentary and oral, which the learned Election Tribunal has relied upon, to come to the conclusion that the charge of bribery against the 1st respondent in relation to the 4th respondent was not proved. Though the fact of the correspondence and the notices evidenced by Exhibits A-2, A-3, A-4, A-6, B-1, B-2 and A-7, A-8, and A-9 having passed between the parties cannot be disputed, still when these exhibits are considered in the light of the oral evidence of P.Ws. 1 and 8 we are constrained to observe that we have not been impressed with the evidence of either P.W. 1 or P.W. 8. A reading of the entire deposition recorded from P.W. 1 leaves us with the impression that P.W. 1 is thoroughly unreliable and is a despicable witness. Though P.W. 8 has been called in to corroborate the payment of Rs. 500 to the 4th respondent, we do not think that his evidence could be accepted or acted upon. We are inclined to believe that Exhibits A-2 and A-3 must have come into existence in the circumstances narrated by the 1st respondent. The 4th respondent is said to have returned the sum of Rs. 100 alleged to have been paid by the 1st respondent for the obtaining of the voters' list but is said to have retained Exhibits A-2 and A-3 without returning the same to the 1st respondent. This does not seem to be a natural course of conduct that would have occurred. R.W. 1 would have certainly asked for the return of Exhibit A-2, and why it was not returned or not taken back by R.W. 1 is not made clear from the evidence of P.W. 1 or P.W. 8, who is called in to corroborate P.W. 1 in other particulars as well. However, in our opinion, nothing turns upon Exhibit A-2 and Exhibit A-3. Nor could we say that the other exhibits, namely the notices exchanged between the parties carry the case of the appellant any further. There have been demands and denials of these demands, and in the face of these, the question is as to whose evidence is to be considered more trustworthy. Is it the evidence of P.W. 1, P.W. 8 and P.W. 10 or is it the evidence of R.Ws. 1, 3, 9 10 and 11 that could be accepted. In our opinion all things taken together, the evidence on the side of the respondents seems to be more trustworthy and acceptable than the evidence on the side of the appellant.

In regard to the *alibi* set up by the 1st respondent it is in evidence that the 1st respondent was discharged from the Vellore Hospital in December. He had been there for treatment of some disease, which he had developed by reason of frequent air travel to the States and other countries, to which he had gone at an earlier stage. The last date for the receipt of the nomination for the election in question was 28th January, 1957. After filing his nomination, the 1st respondent returned to Tirunelveli and stayed in one of the lodges in Tirunelveli on the 29th. A ticket was purchased on 28th January, 1957, for his journey to Madras on 30th January, 1957. He left Tirunelveli on 30th January, 1957, by the Trivandrum Express and reached Madras on 31st January, 1957. At Madras, on that date, he had a trunk telephone call from Swayamprakasam and also attended a meeting of the directors of the Board of India Cements. Again, for his return journey from Madras, Bharath Travels reserved a ticket for him. On the same day, *i.e.*, 2nd February, 1957, he had put in a trunk call to Tanjore and his brother R.W. 3 also, from his place in Tirunelveli, on the same day put through a trunk call to Madras. R.W. 3 inquired of the health of his brother the 1st respondent through this trunk call. The 1st respondent left Madras on 2nd February, 1957, for Tirunelveli by the Trivandrum Express and reached Tirunelveli on 3rd February, 1957 and stayed in the same lodging house. Fourth February, 1957, was the date of withdrawal of nominations. On 6th February, 1957, the 1st respondent again left Tirunelveli and reached Madras on 7th February, 1957. After staying for a couple of days at Madras he returned to Tirunelveli on 9th February, 1957. Once again, the 1st respondent left Tirunelveli on 17th February, 1957, by the Trivandrum Express. R.W. 2 proves the reservation for this and for the earlier journey on 6th February, 1957 and 7th February, 1957, and the reservation tickets are also produced. The 1st defendant arrived at Madras on 18th February, 1957 and on that day he put through a call to the Vellore Hospital requesting them that he should be given a double dose of injections in view of the fact that he would not be available for the second injection. On 17th February, 1957, itself, his office at Madras had been instructed to reserve a seat for him for his return travel on 19th February, 1957. The 1st respondent then left Madras on 19th February, 1957 and returned to Tirunelveli. The chart exhibited at the railway station at Madras proved the reservation for the 1st respondent and the railway ticket-examiner spoke to the fact that all the seats booked had been filled up in the train. On 20th February, 1957, the 1st respondent was at Madurai and he collected all the printed materials and reached Tirunelveli on 21st February, 1957 and proceeded to Kayanoli.

According to the appellant's case the first meeting with P.W. 10 is said to have been on 1st February, 1957 and if the evidence of the 1st respondent is to be believed, the 1st respondent could not have reached Kulasekarapatnam, where the meeting is said to have taken place in the morning of 1st February, 1957, because admittedly the train reaches Tirunelveli only about the noon. Even so, the third meeting could not have taken place at Udankudi in the morning as alleged by the appellant because in that case also the train reaches Tirunelveli very late in the afternoon. There is, however, no controversy with regard to the presence of the 1st respondent on the 4th February, at Tuticorin, but with regard to his presence at Tuticorin on the 1st, 2nd and 3rd February, 1957, what thelearned counsel for the appellant urges is that there is considerable doubt and that it was for the 1st respondent therefore to have proved positively and free from any other alternative possibility, that he was not present on the said dates at Tuticorin. In the course of the deposition of R.W. 3, however, he stated definitely that while he was present at the time of the scrutiny of the nominations on the 1st February, 1957, the 1st respondent was absent from Tirunelveli district between the 30th January, 1957 and 3rd February, 1957. He also deposed that he went to Tuticorin on the 4th February, 1957 and withdrew his nomination filed for the Tiruchendoor constituency and that the 1st respondent did not accompany him, because it was on that day P.W. 10 withdrew his nomination from the Sattankulam constituency. The learned counsel for the appellant relied upon Exhibit A-37 and drew our attention to the said exhibit which is an authorisation by the 1st respondent addressed to the Returning Officer to the effect, that he was appointing his brother R.W. 3 as his election agent for the Sattankulam constituency

and that it was issued from the camp at Tuticorin and dated 4th February, 1957. This letter does not by any means help the case of the appellant. It is admitted that the 1st respondent was camping at Tuticorin on 4th February, 1957.

In this connection, the learned counsel for the appellant raised the question that under section 90 (1) and (2) of the Representation of the People Act, every election-petition shall be tried by the Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits and that the provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of the Representation of the People Act, be deemed to apply in all respects to the trial of an election petition. Relying upon section 93 of the Representation of the People Act the learned counsel for the appellant also contended that a trial in an election petition before the Tribunal shall be deemed to be more of the nature of a trial in a civil proceeding and very much less of the nature of a trial in a criminal proceeding. Questioning the applicability of the ruling in *Vashist Narain Sharma* v. *Devchandra and Others*[1], which has been relied upon by the learned Election Tribunal, the learned counsel for the appellantargues that, while the burden to prove the allegations made against the 1st respondent in regard to the offer of bribe lies heavily on the objector, *viz.*, the appellant, still the appellant has discharged the burden in so far as he had succeeded in showing that the *alibi* evidence adduced by the 1st respondent was not free from doubt and did not rule outan alternative possibility of some one else having travelled and done the various other acts relied upon by the 1st respondent and the 1st respondent taking advantage of the same to support his case. The point urged by the learned counsel for the appellant is that the theory of preponderance of probabilities would apply to the circumstances of the present case; and that when once he had shown another probability, the burden would shift on to the 1st respondent to prove positively the plea of *alibi*. The basis of this argument by the learned counsel for the appellant would appear to be that since the Evidence Act and the Civil Procedure Code apply to the trial of an election petition by the Tribunal, the theory of the shifting of the burden would also operate, in which case, the 1st respondent was bound to prove his plea of *alibi* with more definite and positive evidence. The substance of the argument of the learned counsel for the appellant seems to be that the trial of an election petition is essentially a civil proceedings as contemplated under sub-sections (1) and (2) of section 90 of the Representation of the People Act and considered in the light of section 100 of the same Act and sections 3 and 4 of the Evidence Act. We do not think that we can agree with this contention of the learned counsel for the appellant. In our opinion, the trial in an election petition is a quasi-criminal trial and not a civil trial. In *Harish Chandra* v. *Triloki Singh*[2], it was observed that it should not be forgotten that charges of corrupt practice are quasi-criminal in character and that the accusation in relation thereto must be sufficiently clear and precise to bring home the charges to the candidate. Judged by that standard it is the duty of the appellant to prove beyond any reasonable doubt, that the 1st respondent could have been present on the relevant dates and could have resorted to the corrupt practice alleged against him. The standard of proof in an election enquiry, in our opinion, is the same as could be achieved in a criminal trial. In *Narasimha Reddi* v. *Bhoomaji*[3], a Bench of the Andhra High Court held that allegations as to corrupt practices as those referred to in sections 123 and 124 are of a quasi-criminal nature and the standard of proof required to establish them is the same as pertains to proof in criminal cases and that the onus of establishing a corrupt practice beyond reasonable doubt rests heavily on the petitioner. Even so, in *Inayatullah* v. *Diwanchand*[4], it has been held by a Bench of the Madhya Pradesh High Court that the trial of an Election Tribunal is in the nature of an accusation and is a quasi-criminal action. If the same test is applied, then there would be a presumption of innocence and strict proof would be required before persons charged are held to be responsible. No doubt the procedure followed in enquiries in election

1. (1954) S.C.J. 717: (1954) 2 M.L.J. 379: (1955) 1 S.C.R. 509.
2. (1957) S.C.J. 297: 1957 S.C.R. 370: A.I.R. 1957 S.C. 444.
3. A.I.R. 1959 And. Pra. 111.
4. A.I.R. 1959 Madh. Pra. 58.

petitions is civil in form, but in substance, it is a criminal trial, especially when one keeps in view the results and consequences that follow from the decisions in election petitions. Simply because the procedure to be followed is civil in form, it cannot be contended that the amount of proof required for bringing the charges home to the person against whom the accusation is made, is reduced to that of an enquiry in a purely civil proceeding so as to give room for the theory of the balance of probabilities or the shifting of the burden. We do not think that it is open to the learned counsel for the appellant to contend that if he has proved a *prima facie* case against the 1st respondent, it is for the 1st respondent to rebut the *prima facie* case made out against him. The learned counsel for the appellant, in our opinion, ignores the distinction that has to be kept in mind, *viz.*, the procedure that has to be followed by the Election Tribunal in accordance with the provisions of the Representation of People Act and the amount of proof that has to be adduced in order to establish the charges made in the petition against the successful candidate. The object of an enquiry in an election petition, it must be remembered, is mostly punitive, though it may not be wholly so. The public policy involved in setting aside elections where corrupt practices are proved and the penalties that follow when such corrupt practices are established, is an important factor which has to be kept in view, when the nature of the enquiry in an election petition is to be determined. If the enquiry is before a Civil Court, which follows the Civil Procedure Code, ordinarily no penalties ensue, and it cannot be said that the trial is a punitive one, but where the consequences partake of penalties such as disqualifications and fines, etc., it is futile to contend that the enquiry is still a civil one. In *Ram Dial* v. *Sant Lal*[1], a Bench of the Punjab High Court has held that a charge of corrupt practice in election petitions has to be treated just like a quasi-criminal charge and if the language of any particular sub-section of section 123 in terms is not attracted, the benefit should like all criminal trials, be given to the person charged with the commission of the alleged corrupt practice. In *Balwant Rai Tayal* v. *Bishan Saroo*[2] a Bench of the Punjab High Court has held that in election petitions, so far as they relate to charge of corrupt practice, there is a very great similarity to a criminal trial, and where a long list of witnesses is given as being the persons who will support a particular charge, witnesses produced thereafter whose names are not on such list are more or less in the same position as witnesses produced in criminal trials whose names have not been revealed in the first information report. It goes without saying that in a civil proceeding there are two parties involved. Their mutual rights and obligations which come up for determination are purely of a civil nature, and the result of a decision in such a dispute does not involve fines or penalties or disqualifications or loss of status and position. Such civil proceedings cannot be compared with election petitions filed under the Representation of People Act, where the terminology used is 'election offence', 'proof of guilt', 'accusations', 'charges', 'penalties' and so forth, indicating beyond any doubt that the trials of election petitions are of a criminal nature, though governed by the Civil Procedure Code and the Evidence Act, in so far as the form of the trial is concerned. Therefore, we are unable to agree with the learned counsel for the appellant that he has *attained* the standard of proof that is required in order to demolish the plea of *alibi* set up by the 1st respondent. We think that the appellant has failed to discharge the burden that lay heavily upon him to prove beyond reasonable doubt that the plea of *alibi* is not substantiated and that therefore it should not have been accepted by the Election Tribunal.

* * * * *

In the result, we do not think that the appellant has made out any case for our interference with the decision of the Election Tribunal, and we have no alternative but to dismiss the appeal, and it is accordingly dismissed with costs. Rupees two hundred and fifty is fixed as costs.

The memorandum of cross-objections is against the refusal of the learned Election Tribunal to award costs to the 1st respondent in consequence of his having dismissed the election petition. We have read the reasons given by the learned Elec-

1. A.I.R. 1959 Punj. 240. 2. 17 El. L. R. 101.

tion Tribunal for declining to awards costs. We do not think that there is sufficient ground for us to interfere with that order. The memorandum of cross-objections will therefore stand dismissed without costs.

Appeal and Memo. of Cross-objections dismissed.

V.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

The State of Madras by Superintending Engineer, Manimuthar Headworks Division .. *Appellant**

v.

K. Sankiah Thevar .. *Respondent.*

Workmen's Compensation Act (*CIII of* 1923), *section* 3 (1) *and Proviso* (*b*) (ii) *and section* 12—*Applicability and scope*—" *Out of and in the course of his employment* "—*Government project*—*Work entrusted to contractor*—*Latter engaging coolies for work*—*Workmen prohibited from remaining at premises during break or interval because of danger from blasting operations*—*Siren blown warning workmen to leave*—*Workmen remaining on spot and taking lunch in excavation*—*Death by accident*—*Right to compensation*—*Government paying compensation without notice to contractor*—*Right to recover same from contractor under indemnity clause.*

If during meal times or other intervals, the workman remains on the employer's premises under such circumstances that he continues in the course of his employment, the risks of so doing are risks incidental to his employment, *e.g.*, locality risks or risks arising from reasonable acts. If the workman, even during the lunch interval sustains accidents in the course of the employment, or other work incidental or ancillary thereto, and not because of his own independent and unconnected private adventure or activity, he is usually entitled to compensation under the Workmen's Compensation Act.

But he will not be entitled to recover compensation for accidents caused by his acting unreasonably or unlawfully or by incurring unnecessary risks. Where the workman is specifically forbidden to be on the work spot during the lunch interval, owing to dangerous operations like blasting, and sirens are blown to warn him to leave the place, but he persists in remaining there foolishly eating his lunch in an excavation subject to the influence of blasting and meets his end, the employer cannot be held to be liable to pay compensation in respect of any accident.

Where the Government, the employer, entrusted the work of blasting to a contractor and the contractor engages coolies who work under him the contractor agreeing that 'it shall be his sole responsibility to protect the public and his employees against accident from any cause and he shall indemnify Government againt any claim for damages for injury to person or property resulting from any such accidents and shall, where the provisions of the Workmen's Compensation Act apply, take steps to properly insure against any claim thereunder' and Government pays compensation when a claim is made, the Government cannot recover it from the contractor under the indemnity clause. The case being one in which there would be no liability on the part of the Government or the contractor to pay compensation for the death under the Act, if the Government pays compensation out of pity without giving notice to the contractor, its act is no doubt praiseworthy, but it has no legal right to claim indemnity from the contractor under the indemnity clause.

Persons cannot be charitable at other people's expense. The contractor's laches in not insuring against risks and relying on false positions in law would not alter the position or render him liable to indemnify the Government. The indemnity would extend only as far as legal liability extends and no further. It cannot cover acts of charity, magnanimity, special grace, pity or liberality.

Willis on Workmen's Compensation Act, 1942 edition, page 112, followed.

Vishram Yesu v. *Dadabhoy Hormasji and Co.*, I.L.R. (1942) Bom. 225, *Ramabrahmam* v. *Traffic Manager, Vizagapatnam Port*, (1943) 1 M.L.J. 260 : *Blovelt v. Sawyer*, L.R. (1904) 1 K.B. 271, *Armstrong Withworth and Co.* v. *Redforf*, L.R. (1920) A.C. 757, *Simson* v. *L. M. and S. Ry. Co.*, L.R. (1931) A.C. 351, *Rosen* v. *S. S. 'Quercus'*, L.R. (1933) A.C. 494 and *Charles R. Davidson and Co.* v. *M. Robb, Ord. Officer*, L.R. (1918) A.C. 304, referred to.

Appeals Against the Orders of the Court of the Additional Commissioner for Workmen's Compensation, Madras, dated 31st December, 1955 and made in I.A. Nos. 221, 222 and 223 of 1955 respectively.

The Government Pleader (*B. V. Viswanatha Iyer*) for Appellant.

P. S. Srisailam and *V. S. Ramakrishnan*, for Respondent.

* A.A.O. Nos. 145, 146 and 147 of 1956.

25th November, 1958. (4th Agrahayana, Saka 1880)

The Court made the following

ORDER.—These are three appeals filed by the State of Madras, represented by the Superintending Engineer, Manimuthar Head Works Division, Manimuthar Dam, against the orders of the Additional Commissioner for Workmen's Compensation, Madras, in I.A. Nos. 221 to 223 of 1955, rejecting the prayer to make Sankiah Thevar, the contractor in charge of the works at the spot where the accident occurred, indemnify the Government and return to them three sums of Rs. 720, Rs. 720 and Rs. 200 paid by them in respect of the death of Mythar Bathi, Mytheen Bathi and Subramaniam, killed by a landslide, under the Workmen's Compensation Act.

The facts are briefly these. Mythar Bathi, Mytheen Bathi and Subramaniam were daily coolies engaged under the contractor, Sankiah Thevar, the respondent, in the Manimuthar Dam Works. When the work was in progress, blasting had to be resorted to between 12 noon and 1 P.M. and, as it was a dangerous process involving considerable risk to life, workmen were prohibited from remaining at the work-spot. The three deceased persons as well as other workmen were expected to work from 7. 30 A.M. to 12 noon and again from 2 P.M. to 5-30 P.M. There was a break of two hours from 12 noon to 2 P.M. when the workers were not only not expected to remain at the work-spot but were not given an option to do so and were expressly directed to go away from the work-spot, according to the contractor. The reason for this was of course the dangerous blasting operations between 12-30 P.M. and 1 P.M. Because of this at 12 noon a siren was sounded asking the workers to disperse and go away from the work-spot. At 12-30 P.M. just before the blasting began, a warning siren was again sounded asking the workers to clear out of the work-spot as blasting was about to begin. Despite all this, the three deceased workers did not leave the work-spot on 29th May, 1954 at 12 noon, when the siren sounded, or even at 12-30 P.M. when the warning siren sounded. At 12-30 P.M. the blasting began, and at 12-45 P.M. as a result of the blasting, there was a side-slip or landslide at an excavated spot. Unfortunately for the three deceased, they were then taking their lunch at that very spot with the consequence that when the land-slip occurred all the three were buried by it and they died. Claims were put on their behalf for compensation under the Workmen's Compensation Act, against the State, the principal employer. The Workmen's Compensation Act allows such claims to be preferred either against the principal employer or against the contractor directly employing the workmen as the claimants chose. The State of Madras did not contest the claims for compensation and did not also give any notice to the contractor, Sankiah Thevar, regarding the claims and allow him to contest the claims if he so chose, before the deposit of the amounts. The Additional Commissioner for Workmen's Compensation awarded Mythar Bathi Rs. 720, Mytheen Bathi Rs. 720 and Subramaniam Rs. 200 as compensation under the Act. These sums are pitifully small for loss of human lives, but are the amounts directed by the Act. It is not disputed by the contractor's counsel that if the claims are sustainable the compensation paid was reasonable and proper. After paying these amounts, the State of Madras, through the Superintending Engineer, applied to he Commissioner for Workmen's Compensation to make the contractor Sankiah Thevar, in whose section the accident had occurred, to indemnify the Government under the following clause in the contract between the Government and the contractor.

"It shall be the contractor's sole responsiblity to protect the public and his employees against accident from any cause and he shall indemnify Government against any claims for damages for injury to person or property, resulting from any such accidents and shall, where the provisions of the Workmen's Compensation Act apply, take steps to properly insure against any claim thereunder."

It was alleged that the contractor had neglected to effect any such insurance.

The Additional Commissioner for Workmen's Compensation, held that the accident to the three workmen did not arise out of and in the course of their employment, as the accident occurred during the break between 12 noon and 2 P.M. for lunch, and work was suspended, and workmen were not expected to remain at the spot during the break. So, he dismissed the application of the State for indemnity. Hence these three appeals by the State.

I have perused the records, and heard the learned Government Pleader for the State and Mr. V. S. Ramakrishnan, the learned counsel for the contractor, Sankiah Thevar, the respondent in all the three appeals.

The learned Government Pleader raised three main contentions. The first was that the lower Court was wrong in holding that the claims would not be sustainable because the accidents occurred during the lunch break and not during the hours of work. He said that taking lunch and answering calls of nature were incidental to the employment and that accidents occurring during such activities would be accidents arising in the course of the employment, though perhaps strictly not out of the employment, and, relied on the Bench ruling of this Court in *Ramabrahman* v. *Traffic Manager*, *Vizagapatam Port*[1], where the accidents occurred during the hours of work, though not at the spot of work and not arising strictly out of the work.

That is so. Mr. Ramakrishnan did not dispute this point, but urged that in this case the accident occurred not during the work hours but during the lunch break.

The learned Government Pleader then urged that even if the accidents occurred outside the work hours and during the lunch break, they have been held to arise in the course of the employment when they are proved to be incidental to the work and ancillary to it and not out of something done for the worker's own sole benefit unconnected with the work on hand, like a worker going from the work-spot to a swimming pool outside the premises to have a swim and getting drowned in that pool, or, buying a sausage from a restaurant outside the work-spot during the lunch break and dying of some poison contained in it. The learned Government Pleader relied on the rulings in *Vishram Yesu* v. *Dahaboy Hormasji & Co*[2], *Blovelt* v. *Sawyer*[3], *Armstrong Withworth & Co.* v. *Redforf*[4], *Simson* v. *L.M.S. Ry*[5], *Rosen* v. *S. S. 'Quercus'*[6] for this position, and cited *Charles R. Davidson and Company* v. *Robb, Ord. Officer*[7], to show the limitations of this principle and the refusal of compensation where the person killed by the accident had undertaken an expedition for his own benefit and brought the accident on himself instead of sustaining it in the course of his employment.

Mr. Ramakrishnan wanted to contest this position by saying that the contractor had no control over the workmen during the lunch break and could not be held liable for whatever accident that occurred during that break. According to him, at 12 noon the contractor must be deemed to have handed over the premises to the State of Madras and the Superintending Engineer, his employer, and, to have taken over the premises from the State of Madras and the Superintending Engineer at 2 P.M. This is artificial and unconvincing. It was not Mr. Ramakrishnan's contention that there was any formal handing over of charge and taking over of charge. Nor is it reasonable to expect such handing over of charge and taking over of charge. The weighty rulings of the House of Lords, cited by the learned Government Pleader, fully proves his point, *viz.*, that if the workmen even during the lunch interval, sustain accidents in the course of the employment or incidental or ancillary thereto and not because of their own independent and unconnected private adventure or activity, they are normally entitled to get compensation under the Workmen's Compansation Act. But, there is one limitation to this, *viz.*, where the workmen are specifically forbidden to be on the work-spot during the interval, owing to dangerous operations like blasting taking place, and sirens are blown to warn them to leave, and they persist in remaining there foolishly and get involved in accidents like this. Though there was no evidence let in on either side, the contractor had specifically stated that the workmen were forbidden from being on the premises from 12 noon to 2 P.M. as there were blasting operations, and, that the siren was blown at 12 noon asking them to disperse and a warning siren was blown at 12-30 P.M. warning them that blasting was about to begin and they should clear out if they had not cleared out already and, yet these workmen

1. (1943) 1 M.L.J. 260.
2. I.L.R. (1942) Bom. 225.
3. L.R. (1904) 1 K.B. 271.
4. L.R. (1920) A.C. 757.
5. L.R. (1931) A.C. 351.
6. L.R. (1933) A.C. 494.
7. L.R. (1918) A.C. 304.

remained eating their lunch in an excavation subject to the influence of blasting and met their end and so they could not get any compensation, and though the Government paid them compensation, they could not recover it from him. This point was not met by the Government. Nor can the learned Government Pleader's request for a remand to let in belated evidence to the contrary be now granted. It is well known that every case must be decided on its own facts. Though the Government Pleader quoted many authoritative decisions in support of the legal position referred to above, he was unable to meet the position arising out of the peculiar facts of this case.

In this connection Mr. Ramakrishnan rightly relied on the observations of Willis at page 112 of his treatise on Workmen's Compensation Act, 1942 edition, which run as follows :—

> " If, during meal times or other intervals, the workman remains on the employer's premises under such circumstances that he continues in the course of his employment the risks of so doing for example, locality risks, or risks arising from reasonable acts, are risks incidental to his employment.
>
> . . . .
>
> But he will not be entitled to recover compensation for accidents caused by his acting unreasonably or unlawfully, or by incurring unnecessary risks, as where the workman took his meals seated on a tank in a pump room, where he had no right to go, although there was no express prohibition against his going there ".

In the present case there was an express prohibition also to the workmen to remain at the spot, and those three foolish workers did not obey the order to clear out at 12 noon or at 12-30 P.M., when the sirens were blown, but remained, in that dangerous excavation subject to the effects of blastings, eating their lunch, with the inevitable consequences that when the blasting commenced the excavation area was affected and they were buried and killed. So, the case is one where there would have been no liability on the part of the State or the Contractor to pay compensation for their deaths under the Workmen's Compensation Act. The State paid the compensation evidently out of mere pity as it cannot be said to be so ingorant of the law as to pay despite lack of liability. But, it is obvious that, though the act of the State in paying compensation is praiseworthy in this case, like the recent act of a Government in giving compensation to the dependents of each person killed by shooting in the course of rioting, there is no legal liability to give compensation, and, therefore, no legal right to claim idemnity from the contractor under the idemnity clause referred to above.

Persons cannot be charitable at other people's expense. That is the first principle of ethics as also of law. If the Government had felt any doubt regarding their liability for these accidents, they should have given notice of the claims to the contractor and allowed him to fight out the claims, if he chose, just as motor car owners involved in accidents leave it to the insurance companies to fight it out. The State in this case did not give notice to the contractor. As I have held, on the facts of this case, that there was no liability on the part of the State to pay compensation to the victims of this accident under the Workmen's Compensation Act, as these victims had brought the accident on themselves by their own folly in exposing themselves to unnecessary risks despite the express provision, it follows that the State cannot recover anything from the contractor. The contractor's laches in not insuring against risks, and his relying on false positions in law likenon-liability for accidents during lunch break, will not alter this position, but only, disentitle him to costs when these appeals are dismissed, as they deserve to be.

I may add here, that this is not a case where the accident took place during the hours of work or during the lunch break where the workmen had an option to remain on the premises, but, took place during a break from 12 noon to 2 P.M., when the workmen were expressly forbidden to be at the permises owing to the dangerous blasting, and, two sirens were also sounded to reinforce this prohibition and to make the stragglers clear out. In my opinion, it will be quite unreasonable to make the employer or the contractor pay compensation in such cases. I have no hesitation in agreeing with Willis' opinion on this point. When the employer was not liable to pay compensation, and, if he pays compensation out of pity, special grace,

magnanimity or liberality, he has no right to recover it from the contractor, under any clause for indemnity in the contract. Indemnity will extend only as far as legal liability extends, and not further. It will not cover acts of charity, magnanimity, special grace, pity, or liberality.

In this view, though I agree with the learned Government Pleader that such clauses of indemnity included in contracts with contractors are perfectly legal and can be enforced in all cases where Government, as employer, is bound to pay compensation for accidents under the Workmen's Compensation Act, the facts of this case make the indemnity clause inapplicable as there was no legal liability on the part of the Government to pay compensation.

These three appeals, therefore, deserve to be, and, are hereby, dismissed, but, in the peculiar circumstances, without costs.

P.R.N. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Ramachandran .. *Appellant.**

Evidence Act (I of 1872), section 27—Scope—' In the custody of a police officer '—Words should be construed broadly—Extra-judicial confession—Evidentiary value—Extent of.

The weight to be given to an extra-judicial confession would depend entirely upon the context of circumstances, the person to whom it was made and the actual conditions under which it was made, which may probabilise the voluntary nature and truth of the confession or otherwise. Where it was made spontaneously by the accused to a Magistrate who was not then concerned with the investigation of that offence who was not even aware of the identity of the person appearing before him or of the fact that any offence had been committed the confession is certainly entitled to a very great weight unless there are any reasons suggested to the contrary by the defence. The extra-judicial confession in the instant case was held to be admissible both as admission and as a report of first information.

The spirit of the language employed in section 27 of the Evidence Act, appears to imply that where a person submits himslf to the custody of a Police Officer with the consciousness that temporarily at least he is in such custody or under such control whether formally authorised or not, the information given by him to such officer leading to the discovery of a relevant fact may be proved within the scope of the section. To limit the meaning of the expression further by imposing conditions as to the time of the arrest the existence or the absence of a formal magisterial order authorising police custody or interrogation etc., does not seem to be justified either by the context or by any inherent feature of the scheme of sections 25 and 26 to which section 26 clearly constitutes a proviso or exception.

The expression ' in the custody of a Police Officer' in section 27 of the Evidence Act should be interpreted broadly.

Trial referred by the Court of Session of the West Tanjore Division at Tanjore for confirmation of the sentence of death passed upon the said Prisoner in Case No. 32 of the Calendar for 1959, on 4th July, 1959.

T. M. Chinniah Pillai, for Appellant.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Judgment of the Court was delivered by

Anantanarayanan, J.—The appellant, Ramachandran, has been convicted of the murder of a woman named Pappal, and also of causing disappearance of the evidence of offence (sections 302, Indian Penal Code and 201, Indian Penal Code), and sentenced to death for the offence of murder. The learned Sessions Judge of Tanjore, who tried the case, has not imposed a separate sentence under section 201, Indian Penal Code, as he considered that, that was not required or desirable, following the Bench decision of this Court in *Emperor* v. *Rama Goundan*[1].

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* Referred Trial No. 65 of 1959. 5th September, 1959. (14th Bhadra, 1881—Saka)

1. 54 L.W. 561.

The appellant and Pappal (deceased) were related, being cousins, and the appellant is a young man of about 22, while the woman definitely older. The two were in illicit intimacy, which was also a prohibited relationship, amounting to incest. Pappal was married and had two children, but she had left her husband and was living with her mother (P.W. 1) in a house the rear portion of which was occupied by the accused. We have very considerable evidence regarding the illicit intimacy, consisting of the testimonies of P.Ws. 1, 2, 3, 4, 5, 6 and 8. There is also evidence that the deceased was of loose conduct with others as well, and this is spoken to by P.Ws. 2 and 4. The suggestion for prosecution is that sexual jealousy probably motivated the appellant to commit this crime.

On Wednesday, 11th March, 1959, the appellant and the deceased were seen by Sambandam (P.W.8) proceeding towards the eastern portion of the village, the appellant then having an *aruval*. After that, the victim was not seen alive by anyone.

Though Pappal thus disappeared, neither her mother (P.W. 1) nor anyone else, seems to have suspected anything gravely amiss. But at about 4-25 P.M. on 13th March, the appellant appeared before Mr. Raghavachari (P.W. 7), the Judicial Sub-Magistrate of Papanasam, while the officer was in this Court-hall. The appellant then surrendered himself, after making a statement that he had murdered Pappal on the 11th of March. It is important to note that both the mother of the victim (P.W. 1) and the police came to know of this offence only through learning about the statement of thea ccused to the Magistrate. The subsequent report of P.W. 1 to the village headman (Exhibit P-1) and the *yadhasts* (Exhibits P-5 and P-5-a), were rightly excluded from consideration by the learned Sessions Judge, as within the ambit of section 162, Criminal Procedure Code. This apart, the Sub-Magistrate recorded what the accused told him (Exhibit P-2), and sent a copy of the record to the police (Exhibit P-2-a), upon which alone investigation followed. After the accused was remanded to the sub-jail by the Magistrate, he was interviewed by the Circle Inspector (P.W. 16), to whom the accused gave some information. The evidence shows that this information was furnished *previous* to the order of the Sub-Magistrate (Exhibit P-3-a), formally delivering the appellant into police custody. The importance of this will be obvious later.

In pursuance of his own statement, the appellant took the Circle Inspector, the Executive Magistrate (P.W. 15), the Medical Officer (P.W. 9) and others to the Coleroon river-bund on the afternoon of the 14th March, and took out the corpse of the deceased from the spot of burial. The body had been placed in two gunny bags (M.Os. 6 and 7), and chemical analysis showed that one of them was stained with human blood. There is no doubt about the identification of the corpse, and this rests upon the evidence of the mother (P.W. 1), and also upon the identity of jewels and other properties taken from the body (M.Os. 1 to 4). The appellant then took the officers to another spot, wherefrom blood-stained earth was recovered after he indicated the spot. The appellant, after this, took the party of officers to his house, and produced from where he had kept them, the *aruval* (M.O. 5), the spade (M.O. 9) and some clothes. Chemical analysis did not reveal that these were stained with human blood, but, as the learned Sessions Judge surmises, it is very probable that the *aruval* and spade were washed in the river after the crime.

The autopsy in this case very clearly showed that the woman had been murdered. According to the doctor (P.W. 9), the cause of death was an *ante-mortem* incised injury, $5\frac{1}{2}'' \times 3'' \times 3''$, on the left side of the neck, cutting muscles, blood-vessels, the trachea and oesophagus. This was a necessarily fatal injury, which must have caused instantaneous death. There was a suggestion in defence in the lower Court, that the appellant admitted to the Circle Inspector (P.W. 16) that he had given 3 cuts to the victim, while the autopsy revealed only a single incised wound. But, as the learned Sessions Judge points out, this was not followed up, as it ought to have been done, by cross-examining the Medical Officer (P.W. 9) on the point whether

more than one cut with an *aruval* could have caused the injury set forth in the *postmortem* certificate, Exhibit P-4.

Apart from all this testimony, there was some other evidence about another extra-judicial confession made by the appellant on the night of the 11th March, itself at about 10 P.M., to one Mani (P.W. 5). P.W. 5 and P.W. 6 speak to this confession, but the learned Sessions Judge did not take this evidence into consideration, because these witnesses were not examined till the 14th March, and they did not earlier report the admission of the crime by the accused, either to the Police, or even to the mother (P.W. 1). We are not clear that this confession should be necessarily disbelieved on this account, and it is noteworthy that no definite hostility is suggested against these witnesses. But, in view of the ample evidence in this case connecting the accused with the crime, this is not of great importance.

At the trial, the accused denied the illicit intimacy with Pappal altogether. He admitted the facts of his appearance before the Magistrate on the 13th of March, and the extra-judicial confession then made by him. He also admitted that he took a party of police and other Officers to the Coleroon river-bund, and pointed out the spot of burial, but his defence was that he indicated the spot shown to him earlier by the Police, that he did not actually unearth the body, that he made no statement to the Circle Inspector (P.W. 16), and that the police themselves seized material objects from his house. With regard to the extra-judicial confession to the Magistrate, his case was that the Police met him in Papanasam Bazaar Street, and asked him to proceed to the Magistrate and make a statement like that, and that he did so. In our view, these defences do not appear to be even remotely probable, for the prosecution evidence makes it clear beyond all doubt that neither the Police nor even the mother of the victim (P.W. 1), had any suspicion that the woman had been murdered, prior to the statement made by the accused himself to the Magistrate. Nor is there anything to indicate that the Police knew the spot of burial, and the spot from which blood-stained earth was seized, at any earlier time, before the appellant indicated these spots to the party of Police and Officers. Since it is indisputable that the woman died as a result of homicidal violence, *viz.*, a mortal injury inflicted with a sharp, heavy weapon like an *aruval*, the question is whether these facts suffice to bring home guilt to the appellant beyond any shadow of doubt.

But, before we proceed into an analysis of this aspect, there are two questions of legal interest and significance, which arise in this case and to which we must turn. They have to be first examined, and they may be set forth as follows. Firstly, we have the question, what is the importance and weight to be attached to an extra-judicial confession, like the one made in this case, by the appellant to the Magistrate, retracted as it stands? Secondly, we have the question of even greater legal significance, whether the statement made by the appellant to the Circle Inspector (Exhibit P. 12), admittedly made at a time when the appellant was in magisterial custody, but not in formal Police custody, should be excluded from evidence under section 27 of the Indian Evidence Act. If that statement is to be excluded, we must further consider whether the prosecution can rely upon the conduct of the accused in unearthing the body, etc., to corroborate the material facts of the retracted confession.

The scheme of sections 21 to 27 of the Evidence Act, when examined, shows that this group of sections relates to admissions, of which a confession by an accused is a species, and to certain circumstances which may prohibit the proof of such confessions or admissions. A confession is a kind of admission, and there is no clear-cut line of demarcation between the two. Again, admissions may be relevant in civil as well as in criminal cases, and, as observed by Horwill, J., in *Titus*, In re[1] admissions that might be proved in civil cases, are not inadmissible in criminal cases as such. An extra-judicial confession is merely a confession made outside the scope

1. (1941) 43 Cr.L.J. 3 : 54 L.W. 81.

of a judicial confession recorded during the investigation of a crime by a Magistrate, after complying with the formalities of section 164, Criminal Procedure Code. The weight to be accorded to such a confession would depend entirely upon the context of circumstances, the person to whom it was made, and the actual conditions under which it was made, which may probabilise the voluntary nature and truth of the confession, or otherwise. A judicially recorded confession is given weight, purely because the law prescribes various precautions which have to be observed by the recording Magistrate, who is bound to satisfy himself, that, as far as he can ascertain, the confession is being voluntarily made. An extra-judicial confession may be retracted, precisely like a judicial confession. In either contingency, the Courts would look to material corroboration of the confessional statement, before fully accepting and acting upon it. The decision of the Privy Council in *Nazir Ahmad* v. *The King Emperor*[1], seems to have caused some misconception upon this aspect, which should be made clear. That was a case in which a confession was made to a Magistrate during the course of an investigation, and the Magistrate empowered to record it did not comply with the provisions of section 164, Criminal Procedure Code, and merely made certain memoranda, even which were later destroyed. The important observation of their Lordships, summing up the true nature of the decision and its precise applicability was as follows :—

> "The effcet of the statute is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

This decision, therefore, does not at all affect the admissibility of extra-judicial confessions, or the probative value to be attached to them. Two decisions of this Court make this very clear. *Arunachala Reddi*, In re[2], was a case like the present, where the accused, after committing the offence of murder, went straight to the nearest Magistrate and made a statement confessing the offence. Only, in that case, the confession was recorded in the manner prescribed by section 164, Criminal Procedure Code. Waller and Krishnan Pandalai, JJ., pointed out that confessions, like other admissions, are relevant under the Evidence Act, unless rendered inadmissible by some circumstance of an invalidating character declared by law. Section 164, Criminal Procedure Code, did not exclude confessions otherwise admissible. Again, in *Nainamuthu* v. *Emperor*[3], Burn and Stodart, JJ. held that where the accused proceeded to a Magistrate after the murder and confessed the occurrence, and the confession was not recorded under section 164, Criminal Procedure Code, for the very good reason that the Magistrate was not then concerned with the investigation of the crime, the statement was admissible, both as a report of first information and otherwise under the law relating to admission. The true scope and applicability of *Nazir Ahmad* v. *The King Emperor*[1], is also indicated here.

Hence, upon this aspect, we must conclude that the present extra-judicial confession is admissible, both upon the law relating to admissions, and as a Report of First Information. As the Magistrate was not then concerned with the investigation of this murder, the procedure under section 164, Criminal Procedure Code, was not adopted, and no infirmity attaches to the statement because of this fact. The weight to be given to such an extra-judicial confession depends entirely upon the circumstances under which it was made. Where, as in this case, it was spontaneously made by an accused, to a Magistrate, who was not even aware of the identity of the person appearing before him, or of the fact that any murder had occurred, the confession is certainly entitled to very great weight, unless there are any reasons for accepting the suggestion in defence, or even considering it probable, that Police had tutored the appellant to go and make such a confession. Where the confession is retracted, corroboration of material particulars is certainly necessary, but this would apply equally to confessions judicially recorded. In a certain

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1. (1936) 71 M.L.J. 476 : L.R. 63 I.A. 372 : I.L.R. 17 Lah. 629 (P.C.).
2. (1932) 62 M.L.J. 680 : 35 L.W. 607.
3. (1940) 2 M.L.J. 89 : I.L.R. (1940) Mad. 428 : 50 L.W. 784.

sense, an extra-judicial confession of this character is even more likely to have been voluntarily made, than a judicial confession, for the simple reason that, whatever the formalities complied with, a judicial confession is almost invariably recorded only after the accused comes under the possible influence of the Police, subsequent to his arrest. Any general impression that prevails that extra-judicial confessions, upon the whole, are necessarily inferior in weight and probative, value, would, therefore, not be correct. Everything would depend upon the surrounding facts circumstances of the case.

We may now proceed to a discussion of the more difficult problem, whether the information furnished to the Circle Inspector ought to be excluded in evidence, as not within the scope of section 27 of the Indian Evidence Act.

We may immediately state that an examination of the authorities upon this matter, shows two broad aspects or tendencies. In a certain line of cases, it has been tacitly assumed, upon a reading of section 27 of the Indian Evidence Act, without much further discussion or scrutiny, that the words " in the custody of a police officer " occurring in the section necessarily relate to a formally authorised police custody, taking place after arrest. There is no comment upon the absurdity of the result of such strict interpretation, which, of course, is the consequence of the language itself *prima facie* set forth tersely and with force if we may say so with great respect, by Rankin, J., in *Durlav* v. *R.*[1], as follows :

"There might be reason in saying that if a man is in custody, what he may have said cannot be admitted ; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody. Yet this is the consequence of saying that section 27 is more than a proviso to section 26. It is, however, well held by authority that, that is so and, until the legislature takes the matter in hand, the paradox expressed in the present case will continue to be law".

The cases of this Court that bear upon this particular question of the nature of the custody, generally assume that unless the accused be in Police custody formally authorised, or in such custody after arrest, section 27 would not apply. Thus, in *Peria Guruswami Goundar* v. *Emperor*[2] Wadsworth and Somayya, JJ., held that section 27 did not apply to a statement made by an accused to a Police Officer, before the deponent came into the formal custody of that Officer. Similar *dicta* are to be found in *Kambala Kalikamurthy*, In re.[3] In In re *Kamakshi Naidu*[4], Horwill, J., held that a confession made by an accused in police custody was admissible under section 27, though the custody itself was not in connection with the offence relating to which the confession was made, but in connection with another offence.

But we find a different line of cases, particularly of the Calcutta, Allahabad and Nagpur High Courts, where a definite attempt has been made to apply a less rigid interpretation to the expression " custody " occurring in section 27. If that interpretation were to be adopted, it would certainly render admissible the information (Exhibit P-12) in the present case, which was given by the accused to the Circle Inspector while he was formally in magisterial custody, and before the Magistrate had made an order authorising his detention in police custody. The interpretation has proceeded so far as to suggest that police ' custody ' in the terms of section 27 might well include surveillance, interrogation before arrest, etc. In *Santokhi Beldar* v. *King Emperor*[5], a Full Bench of the Patna High Court held that when a person who went to a police officer and voluntarily stated the circumstances of a crime, accusing himself of committing it, he submitted himself to the custody of that officer within the meaning of section 46 (1) of the Code of Criminal Procedure, and that section 27 of the Evidence Act applied to the statement. This followed an earlier decision of the Calcutta High Court in *Legal Remembrancer* v. *Lalit Mohan Singh Roy*[6]. In *Chhotey Lal* v. *State of U.P.*[7], it was held that with reference to section 27, "custody" did not mean formal custody, but included any kind of suveillance or restriction or

1. (1931) 36 C.W.N. 373 at 376.
2. 1941 M.W.N. (Cr.) 94.
3. 1936 M.W.N. 835.
4. (1942) 2 M.L.J. 549 : I.L.R. (1943) Mad. 456.
5. (1932) I.L.R. 12 Pat. 241 (F.B,).
6. (1922) I.L.R. 49 Cal. 167.
7. A.I.R. 1954 All. 687.

restraint by the Police. In *M. J. Jamunia Partap Lohar* v. *Emperor*[1]. Grille and Cruer, JJ., observed that even if the accused in the case had not been formally arrested at that time when she gave the information, she was for all practical purposes in police custody, and that section 27, therefore, applied. In *Rambabu Jadav and others* v. *Emperor*[2], the accused was in hospital, in judicial custody, and the police officer examined him with the permission of Court. The Patna High Court observed that section 27 could well be applied to a case of that kind, because actual police custody was then prevailing.

We do not think it is necessary to examine other cases of other High Courts bearing upon the matter, for the trend of the wider interpretation that we have referred to, becomes clear from an examination of the authorities already cited. As far as the authorities in Madras are concerned, the question does not appear to have been discussed in the form in which it now presents itself to us, arising strictly from the facts of this case. It may be impossible to resolve the 'paradox' referred to by Rankin, J., without legislative amendment, but it is certainly desirable to apply a wider interpretation if it could be properly done, so that the anomaly is considerably minimised. Apart from this, we see no reason at all why the expression relating to police custody occurring in section 27 of the Indian Evidence Act, should be rigidly interpreted. After all, what the spirit of the language employed appears to imply is that, where a person submits himself to the custody of a police officer, with the consciousness that temporarily at least he is in such custody, or under such control, whether formally authorised in some manner or otherwise, the information given by him to such officer, leading to the discovery of a relevant fact, may be proved within the scope of the section. To limit the meaning of the expression further, by imposing conditions as to the time of arrest, the existence or absence of a formal magisterial order authorising police custody or interrogation, etc., does not seem to be justified either by the context, or by any inherent feature of the scheme of sections 25 and 26, to which section 27 clearly constitutes a proviso or exception. Please see the decision of the Supreme Court in *Ramakishan* v. *Bombay State*[3].

Therefore, we would conclude that the statement made by the accused to the Circle Inspector, in the present case, was perfectly admissible under section 27 of the Indian Evidence Act. Though, formally the accused was in judicial custody under an order of remand made by the Magistrate, he was temporarily in the 'custody of the Police Officer,' when he was interrogated, and must be held to have been in such custody for the purposes of the applicability of section 27. But, even if we exclude the statement, there is ample corroboration material in the present case to bring home guilt to the accused. The conduct of the accused in unearthing the body, the discovery of blood-stains upon one of the gunny bags in which the body was placed, the seizure of blood-stained earth from another spot pointed out by the accused, the medical evidence itself, all amply and materially corroborate his retracted confession. His guilt was established overwhelmingly, and beyond any reasonable doubt.

We would, therefore, confirm the convictions, both upon the charge of murder and the charge of causing disappearance of evidence of the crime. The sentence of death imposed with reference to the charge of murder is the only one that could be fitly imposed, in the circumstances of the case. The accused seems to have planned the offence, and there is absolutely nothing to suggest that he acted suddenly, in the heat of passion or anger, or even that some kind of altercation preceded the murder. The accused had no rights over the woman, and there is, again, nothing to indicate that any particular conduct on her part was an immediate provocation. We, therefore, confirm the sentence also, and dismiss the appeal.

R.M. *Appeal dismissed.*

1. A.I.R. 1936 Nag. 200.
2. A.I.R. 1938 Pat. 60.
3. (1955) 1 M.L.J. (S.C.) 66 : (1955) S.C.J. 129 : A.I.R. 1955 S.C. 104 (S.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Naina Mohamed .. *Appellant**

Evidence Act (*I of* 1872), *section* 106—*Scope and applicability in criminal trials—Trial based upon circumsiantial evidence—Facts within the knowledge of the accused tending to show his innocence—Failure of the accused to offer explanation about—Relevant factor in conviction.*

The ordinary rule which applies to criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in section 106 of the Evidence Act. Even where there are facts specially within the knowledge which could throw a light upon his guilt or innocence as the case may be, the accused is not bound to allege or prove them.

But in a criminal trial where the guilt of the accused is to be established by circumstantial evidence, where the accused does not throw any light at all upon facts which ought to be specially within his knowledge and which could support any theory or hypothesis compatible with his innocence, the Court can also take into consideration his failure to adduce any explanation in finding him guilty.

Deonandan v. *State of Bihar*, (1955) 2 S.C.R. 570 : A.I.R. 1955 S.C. 801, referred.

Appeal against the Judgment of the Court of Session of the Tirunelveli Division in Case No. 12 of the Calendar for 1959, dated 14th March, 1959.

T. Govindarajulu, (*Amicus Curiae*), for Appellant.

T. S. Bhyme for the Public Prosecutor (*P. S. Kailasam*), for the State.

The Court delivered the following Judgments:

Ramaswami, J.—I entirely agree with the observations of my learned brother enunciating pellucidly, if I may respectfully say so, the scope of section 106 of the Indian Evidence Act and its due place in criminal trials. On account of the importance of the topic, I would like to add the following:

This section should be applied with care and caution in criminal cases. But it cannot be said that it has no application to criminal cases : *B. N. Chatterji* v. *Dinesh Chandra Guba*[1]. See Woodroffe and Ameer Ali's Law of Evidence in India, Tenth Edition, by Malik, C.J., (1958), Volume II, page 1260—Applicability to Criminal Cases.

The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in section 106 of the Evidence Act. This section is on the other hand to be taken along with the provisions of that general rule : *Lachman Singh* v. *The King*[2], *Shambunath* v. *State of Ajmer*[3], *Shewaram Jethanand* v. *Emperor*[4]. In the language of Professor Glanville Williams, this persuasive burden of proof (as opposed to the *evidential burden* envisaged in section 106) namely, the burden of proving all issues remains with the State : Professor Glanville Williams, The Proof of Guilt, (Hamlyn Lectures, seventh series) page 128 and following).

Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has disharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specially within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused. In re *Kanakasabai Pillai*[5];

* Crl. Appeal No. 281 of 1959. 22nd September, 1959.

1. A.I.R. 1948 Cal. 58 : 48 Crl. L.J. 999.
2. A.I.R. 1949 Cal. 235.
3. (1956) 2 M.L.J. (S.C.) 1 : (1956) S.C.J. 429 : 1956 S.C.R. 199 : A.I.R. 1956 (S.C.) 404.
4. A.I.R. 1939 Sind 209 ; 41 Crl. L.J. 287.
5. (1938) 50 L.W. 452 : 1939 M.W.N. 883 : A.I.R. 1940 Mad. 1.

Hada v. *The State*[1], *Emperor* v. *Muzaffar Hussain*[2], *Ram Bharosey* v. *Emperor*[3], *Sahendra Singh* v. *Emperor*[4], *State of Bihar* v. *Amir Hussan*[5], and see also the cases cited therein.

Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the Prosecution unless the accused is able to prove some other facts especially within his knowledge which would render the evidence of the prosecution nugatory. If in such a situation the accused gives an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not *prove* the truth of the explanation: *R.* v. *Schama*[6]. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Professor Glanville. Williams :

> "All that the shifting of the *evidential burden* does at the final stage of the case is to allow the Jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence—Page 129."

To recapitulate the foregoing : What lies at the bottom of the various rules shifting the *evidential burden* or burden of introducing evidence in proof of one's case as opposed to the *persuasive burden* or burden of proof, *i.e.*, of proving all the issues remaining with the prosecution and which never shifts is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand and it is therefore for the accused to give evidence on them if he wishes to escape. Positive facts must always be proved by the prosecution. But the same rule cannot always apply to negative facts. It is not for the prosecution to anticipate and eliminate all possible defences or circumstances which may exonerate an accused. Again, whan a person does not act with some intention other than that which the character and circumstances of the act suggest, it is not for the proseution to eliminate all the other possible intentions. If the accused had a different intention that is a fact especially within his knowledge and which he must prove (See Professor Glanville Williams : Proof of Guilt, Chapter 7, page 127 and following) and the interesting discussion—para. 527, Negative Averments and para. 528—Require Affirmiative Counter Evidence" at page 438 and following of Kenny's Outlines of Criminal Law, 17th Edition (1958).

But section 106 has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only by the accused but also by others if they happened to be present when it took place. From the illustrations appended to the section, it is clear that an intention not apparent from the character and circumstances of the act must be established as especially within the knowledge of the person whose act is in question and the fact that a person found travelling without a ticket was possessed of a ticket at a stage prior in point of time to his being found without one, must be especially within the knowledge of the traveller himself ; See section 106 of the Indian Evidence Act, *Illustrations* (*a*) and (*b*).

The scope of section 106 is well illustrated by the following decisions (*See* the catena of decisions tabulated in Y.H. Rao's Criminal Trial (1959), Wadhwa & Co., page 43 and following ; and collection of cases in Note 19 to section 106, Indian Evidence Act of the A.I.R. Commentaries on the Indian Evidence Act, Corpus Juris of India, Volume 5).

In a case of rioting, if the defence is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon him : *Emperor* v. *Sheo Deyal*[7].

On a charge under section 409, Indian Penal Code, it is not necessary for the prosecution to prove in what manner money alleged to have been misappropriated

1. A.I.R. 1951 Orissa 53.
2. A.I.R. 1944 Lah. 339 (F.B.).
3. A.I.R. 1936 All. 833 : 38 Cr. L.J. 205.
4. A.I.R. 1948 Pat. 222 : 49 Crl. L.J. 445.
5. A.I.R. 1951 Pat. 638.
6. 84 L.J.K.B. 396.
7. A.I.R. 1933 All. 835.

has actually been disposed of by the accused. If it is shown that the money entrusted to the accused was not accounted for, nor returned by him in accordance with his duty, if unspent, it lies upon the accused to prove his defence: *Emperor* v. *Kadir Baksh*[1].

Where the prosecution has discharged by reliable evidence that the accused has fired his pistol in the direction of the Police party who came to arrest him and the character and circumstances of the act suggested that his intention obviously was homicidal though the shots just whizzed over the heads of the policemen and did not cause hurt to any one, it was for the accused under section 106 to prove that his intention was only to frighten the police party by firing into the air in order that he might be able to escape arrest. Where in the circumstances the accused neither stated nor let in evidence towards that end but on the other hand denied having fired, it is not for the Court to draw the inference that his intention might not have been homicidal : *Emperor* v. *Munshi*[2].

The prosecution offered no evidence as to how the fight started or what was the motive which induced the accused to act as he did. But once the only possible inference to be drawn from the facts proved by the prosecution is that the accused voluntarily and deliberately inflicted a fatal wound on the deceased, there is no duty cast on the prosecution to prove the motive. In the circumstances of the case the motive is known only to the accused and he has not chosen to tell the same or rather he has offered an explanation which is false. In the circumstances it is not for the Court to speculate as to a possible motive of which there is no indication on record. The mere fact that the motive is not known (and the accused who alone knows it is not prepared to come out with it) is no reason for assuming that the accused must have acted in the exercise of some right of private defence : *Daulat Ram* v. *Emperor*[3].

In cases of forcible abduction, there can seldom be direct evidence as to the actual intention of the abductor and that intention must be inferred from the circumstances of each case under section 114, Evidence Act. Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first natural presumption must be that he had abducted her with the intention of having sexual intercourse. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies on him under section 106 of the Evidence Act to prove that intention : *Mohammad Sadiq* v. *Emperor*[4].

The law regarding burden of proof in regard to facts peculiarly within the knowledge of the accused is the same in the United States of America and in regard to which Wharton has the following to say :

"A manifest distinction exists between the burden of proof and the burden of going forward with the evidence. Generally the burden of proof upon any affirmative proposition necessary to be established as the foundation of an issue does not shift, but the burden of evidence or the burden of explanation may shift from one side to the other according to the testimony. Thus, if the prosecution has offered evidence which if believed by the jury would convince them of the defendant's guilt beyond a reasonable doubt, the defendant is in a position where he should go forward with countervailing evidence if he has such evidence. When facts are peculiarly within the knowledge of the defendant, the burden is on him to present evidence of such facts, whether the proposition is an affirmative or negative one. He is not required to do so even though a *prima facie* case has been established, for the jury must still find that he is guilty beyond a reasonable doubt before they can convict. However, the defendant's failure to present evidence in his behalf may be regarded by the jury as confirming the conclusion indicated by the evidence presented by the prosecution or as confirming presumptions which might have been rebutted. Although not legally required to produce evidence on his own behalf, the defendant may therefore as a practical matter find it essential to go forward with proof. This does not alter the burden of proof resting upon the prosecution." Wharton's Criminal Evidence 12th Edition (1955), Vol. I, Ch. 2, P. 37 and foll. *Lelond* v. *The State*[5], *Raffel* v. *U.S.*[6]

1. (1910) I.L.R. 33 All. 249.
2. A.I.R. 1936 Oudh 294.
3. A.I.R. 1947 Lah. 244.
4. A.I.R. 1938 Lah. 474.
5. 343 U.S. 790: 96 L. Ed. 1302.
6. 271 U.S. 294: 70 L. Ed. 1054.

To sum up, the accused is always entitled to hold his tongue ; but if he is in a position to explain the only alternative theory to his guilt, the absence of such an explanation must be taken into account, as my learned brother has done in the instant case.

Anantanarayanan, J.—The accused in this case, Naina Mohamed, has been convicted of the murder of a 15 day female infant born to his elder sister Meera Bivi(P.W.1), and sentenced to undergo the lesser penalty of imprisonment for life by the learned Sessions Judge of Tirunelveli.

The proof of guilt in this case depends entirely upon circumstantial evidence. That being so, the aspect of the case relating to motive also assumes some significance. The evidence shows that Meera Bivi (P.W. 1) first married one Shaul Hamid about 6 years back, after developing an illicit intimacy with this man. The woman was divorced, and she subsequently married her present husband Sayed Mohamed, in this case too after an initial illicit intimacy. When P.W. 1 left Kalladaikurichi in order to live in Sahupuram, where herself, her younger sister Bathumma (P.W. 2) and younger brother (P.W. 3) were all employed at the Dharangadhara Heavy Chemical Works, she was about 40 days advanced in pregnancy. At Sahupuram P.Ws. 1, 2 and 3 and their mother were residing in a particular shed in the northern row of sheds for labourers (Plan Exhibit P-10). The accused, who was employed as a mill hand at Veeravanallur, appears to have entertained grave suspicions that the child that P.W. 1 was carrying in her womb was conceived out of lawful wedlock. That child was born about 15 days prior to this murder, and it was a female infant. Very shortly before this murder, the accused came there and asked P.W. 1 and the entire family to go over to Pottalpudur for worship at the *Pallivasal* (Mosque), and further required that P.W. 1 should swear at the Mosque that she had conceived her child only by her husband. P.W. 1 told the accused that she could proceed to Pottalpudur only about 40 days later, and she swears that the accused then " went away angrily ". Apart from this, we have the testimony of one Shamsudeen (P.W. 6), the proprietor of a small tea shop at Thalvanvilai, north of Sahupuram. He knows the accused, and he states that the accused sometimes spoke to him about his family affairs. The accused told P.W. 6 that he was not satisfied with the conduct of his sister, Meera Bivi (P.W. 1), that he felt ashamed on account of her moral character, and also that P.W. 1 had given birth to a child. As we shall see later, there is no hint or suspicion in this case of enmity between the accused and P.W. 1, or between him and his brother and sisters. It is noteworthy that, in the First Report of Information furnished by Meera Bivi (P.W. 1) after the discovery of the murdered infant (Exhibit P-1), she definitely states that she has suspicions only against the younger brother employed in Veeranallur Mills; namely, the accused. That is the testimony relating to motive.

The further facts are that, the evening before the murder, the accused came to Sahupuram and stayed at the hut along with P.W. 1, Bathumma (P.W. 2), Ibrahim (P.W. 3) and their mother. P.Ws. 1 and 2 and the accused slept inside the shed, the female infant lying in a saree cradle at the feet of P.W. 1. The mother and Ibrahim (P.W. 3) slept outside the shed, near the doorway. P.W. 1 woke up at about 11 P.M. to nurse her infant, but found that the baby was missing from the cradle. The accused also was missing from the shed. She then raised an alarm, and all the inmates of the little hut immediately went in search of the child, but without avail. These facts are spoken to by P.W. 1 herself, Bathumma (P.W. 2) and Ibrahim (P.W.3). If they are to be believed, since it is impossible that an infant 15 days old could have walked away on its own accord, the conclusion is irresistible that either the accused, who was simultaneously missing, must have taken away the child, or that some other intruder should have done so.

Early next morning, P.W. 1, P.W. 2 and P.W. 3 continued their search for the missing child, which had been unavailing during the night. They came across the body of this child, lying upon a tree-branch with a cut-injury on the neck, in an odai forest about three furlongs west of Sahupuram. A green-bordered dhoti which

the accused had worn the previous night (M.O. 1) also lay at a short distance from that tree, to the west, having blood-stains upon it. These people then went to the Police Station at Arumuganeri where P.W. 1 made her first report (Exhibit P-1), upon which investigation followed. The Circle Inspector (P.W. 11) states that he visited the spot of offence that afternoon, and recovered the dead body of the child from where it lay on the branch of a odai tree at a height of about 2½ ft., and also recovered blood-stained earth from underneath that tree, and the blood-stained green-bordered dhoti (M.O. 1) which lay on the branch of another tree about half a furlong away.

The autopsy on this child was held by Dr. Achai (P.W. 4), the woman medical officer of the Local Fund Dispensary at Kayalpatnam, from 8 A.M. the next day (12th December, 1958). There was an incised wound 5" long, bone deep, across the upper part of the neck in front. The trachea, larynx and the major blood vessels were all severed. Death was due to shock and haemorrhage from this necessarily fatal injury, and death must have been instantaneous. The injury was due to some sharp weapon like a knife, perhaps even a pen-knife. This medical evidence makes it clear beyond doubt that the child did not die of any accidental or natural cause, but that it was deliberately murdered. Whoever inflicted this homicidal violence on the infant, was clearly guilty of murder.

Apart from all this, we have the very important testimony of Ramasubramaniam (P.W. 5), an electrician employed in the Nellai Trading Company. He states that on this very night he was returning at about 10-30 P.M. to his house, through a pathway which runs west of Sahupuram. When he was about two furlongs west of Sahupuram, he saw a man proceeding in advance, who later sat down. He went near that man, and flashed his electric torch, when the witness discovered that the man was the accused, whom he previously knew. The accused was carrying something on his left shoulder, which gave the impression of a little *height*. The witness (P.W. 5) asked the accused what it was, and the accused said that it was his sister's child which was sick, and that he was carrying the infant to the doctor at Attur. The witness proceeded on his way to Arumuganeri.

The accused was absconding immediately after the offence, and he was arrested on the 24th December at Arumuganeri Railway Station.

The examination of the accused is of great significance in the present case, since the proof of guilt rests only upon circumstantial evidence. The several pieces of testimony which have to be regarded as links in the chain of this evidence, have to be considered in their cumulative effect. As the rule is expounded in the decision of the Supreme Court in *Deonandan* v. *State of Bihar*[1], a decision to which we shall have occasion to refer later also, the completed chain of the several links of circumstantial evidence must then be scrutinised, in order to see whether the only conclusion possible upon this is that the accused is guilty, or whether there is "any reasonable ground for a conclusion consistent with the innocence of the accused." It is in this context that any explanation furnished by the accused in a case of this kind, even though he is not bound to offer an explanation, and even if he is unable to prove or probabilise any part of it, must be very carefully regarded by the trial Court, in order to see whether some hypothesis compatible with the innocence of the accused might at all fit the established facts.

In the present case, the accused has merely persisted in a total denial of every part of the evidence for prosecution. When his attention was drawn to that part of the evidence of P.Ws. 1, 2 and 3 which relates to his insistence that P.W. 1 should swear at the Mosque at Pottalpudur that she had conceived the child only by her husband, he admitted that he desired that all the members of the family should worship at that Mosque before he left for Bombay, but denied the other allegations. When his attention was drawn to the evidence of Shamsudeen (P.W. 6), he did not say that he was unacquainted with this man, or that there was no conversation bet-

1. (1955) 2 S.C.R. 570 : A.I.R. 1955 S.C. 801.

ween them about the chastity or character of Meera Bivi (P.W. 1), but claimed that it was the witness (P.W. 6) who told him about the conduct of P.W. 1. He denied that he went to the hut of P.Ws. 1, 2 and 3 the evening preceding the murder, or that he took his bed there that night. He said nothing about the conduct of P.Ws. 1, 2 and 3 or why they should depose in the manner that they did, about the accused and the infant being missed simultaneously later that night, or the search for the infant the next morning and the discovery of the body. His attention was drawn to the evidence of Ramasubramaniam (P.W. 5) which is a very significant link in the chain of circumstantial evidence, and he stated as follows :—

"I am not well-acquainted with him. I have seen him in the house of P.W. 1. I did not go with anything on my left shoulder as stated. His evidence that he met me and that I spoke to him is false."

Another feature in this case which shows that, even subsequently, the accused and his brother and sisters have not been on inimical terms, is a form (Exhibit P-11) authorising the withdrawal of Rs. 25 from a Post Office Savings Bank Deposit in the name of the accused, which was signed by the accused during committal proceedings, and which permitted P.W. 1 to withdraw Rs. 25 on behalf of the accused. According to P.W. 1, the amount was withdrawn as required for the expenses of the marriage of her younger sister (P.W. 2), while, according to the accused, it was withdrawn on the representation of P.W. 1 that it was necessary for defending the accused. At any rate, the suggestions in the cross-examination of P.W. 1 that she desired to live a free life after deserting her husband and killing her infant, do not derive support from anything said by the accused himself. As regards the blood-stained dhoti (M. O. 1), upon which human blood-stains were found on chemical analysis, the accused again was content with a bare denial that the dhoti belonged to him. Even this was in the committal Court and, during the trial, the accused merely gave the answer 'I do not know'.

We think it is clear that the guilt of the accused was established in this case overwhelmingly, and beyond any element of reasonable doubt, by the cumulative effect of the several links in the chain of circumstantial evidence set forth above, regarded in their entirety. It is clear that the accused had this motive to commit the crime, that he suspected that his sister (P.W. 1) had not conceived the child in lawful wedlock, and that this obsessed him. Probably, as the learned Sessions Judge observes, the accused suffered from a perverted sense of family honour. It is further clear that the accused disappeared simultaneously with the infant that night and these facts, by themselves, would powerfully support the inference that the accused had carried away the child. It is also clear that Ramasubramaniam (P.W. 5) met the accused that very night, carrying something on his left shoulder which gave the impression of a little height, at or about the locality of offence, and that the accused then told this witness that he was carrying his sister's little child, which was ill, to a doctor at Attur. The infant was clearly murdered by the means of a sharp weapon like a pen-knife and the body was found during the search the next morning, while the blood-stained dhoti of the accused (M.O. 1) was also found on the branch of a tree nearby. The accused has not furnished any explanation whatever for any of these circumstances, barring denials, as we have earlier stressed.

Learned counsel for the accused appearing as *amicus curiae* before us, has subjected the evidence for prosecution to a minute and searching analysis. But even he has been able to place before us only stray pieces of criticism. For instance, he claims that the mother of P.Ws. 1, 2 and 3 and the accused who was also in the hut, should have been examined as a witness. We are unable to agree, as there is absolutely nothing suggested against P.Ws. 1, 2 and 3, and the law does not require that the prosecution should examine every witness who might have knowledge of certain surrounding circumstances relating to the offence. It must be noted that these are not direct witnesses to any crime, in which case, perhaps, the argument would have force. Next, it is urged on the strength of certain confused and contradictory statements in the evidence of the young girl Bathumma (P.W. 2), that it appears as if the body of the infant was also brought to the Police Station by P.W. 1 and the others at the inception itself. Since there was no discovery in this case, resulting from a state-

ment made by the accused, and admitted in evidence under section 27 of the Indian Evidence Act, the criticism itself is of little significance. Actually, we have no doubt at all that Bathumma (P.W. 2) is probably confusing the different visits made by her and her relatives to the Police Station that day, and the evidence of Circle Inspector (P.W. 11) is clear and definite about the recovery of the dead body by him at the spot of offence, later that afternoon. There is a further criticism that the Head Constable who actually recorded the First Report of Information from P.W. 1 (Exhibit P-1) ought to have been examined as a witness in the case. We certainly agree that he could have been examined, for the sake of completeness of evidence upon the aspect of investigation. But we are unable to see that anything material turns upon the omission of the prosecution to do this. The criticism that it has not been established that M. O. 1 was the dhoti worn by the accused that night, has not much weight. The article has been identified as the dhoti of the accused by his nearest relatives, and, as far as identification of such an article of clothing is possible at all, the evidence is certainly worthy of acceptance. We must affirm that no grounds have been shown or suggested why P.Ws. 1, 2 and 3 should be anxious to implicate the accused falsely. As regards Ramasubramaniam (P.W. 5), we find a single stray suggestion in cross-examination to the effect that this witness was in illicit intimacy with Meera Bivi (P.W. 1), which suggestion was immediately repudiated by the witness. It is highly significant that the accused says nothing whatever about this, when examined in Court, and that he does not deny that P.W. 5 and himself were at least superficial acquaintances.

In the decision in *Deonandan* v. *State of Bihar*[1], already referred to, there is a very important passage in which Their Lordship deal with the effect of a failure of the accused to offer any explanation for circumstances appearing in evidence against him, in a prosecution based upon circumstantial evidence. The law is very clear that the accused is not bound to offer any explanation, that there is no burden cast upon him to do so, and that the onus of proof does not shift in respect of the vital matter of guilt, at any stage of a criminal trial. But, as stated by Their Lordships :

> " It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which, if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain."

This passage applies with great force, in our view, to the facts and circumstances of the present case.

We have also considered the scope and applicability of section 106 of the Indian Evidence Act, with reference to this case. In *Seneviratne* v. *R.*[2], the Judicial Committee had occasion to comment upon this aspect, with reference to a charge to the jury in a case of murder from Ceylon, where this principle had special applicability to the facts of that case. This decision, and the subsequent decisions of several High Courts in this country, make it clear that section 106 of the Indian Evidence Act cannot apply to shift the burden of proof in a criminal case, where the onus lies upon the prosecution throughout to establish the guilt of the accused beyond reasonable doubt. Even where there are facts specially within the knowledge of the accused, which could throw a light upon his guilt or innocence as the case may be, the accused is not bound to allege them or to prove them. But it is not as if the section is automatically inapplicable to criminal trials, for, if that had been the case, the Legislature would certainly have so enacted. We consider the true rule to be that section 106 does not cast any burden upon an accused in a criminal trial but that, where the accused throws no light at all upon facts which ought to be especially within his knowledge, and which could support any theory or hypothesis compatible with his innocence, the Court can also consider his failure to adduce any explanation, in consonance with the principle of the passage in *Deonandan* v. *State of Bihar*[1], which we have already set

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1. (1955) 2 S.C.R. 570 : A.I.R. 1955 S.C. 801.
2. (1936) 41 C.W.N. 65 : A.I.R 1936 P.C. 289.

forth. The matter has been put in this form, with reference to section 106 of the Indian Evidence Act, in *Smith* v. *R.*[1] namely, that if the accused is in a position to explain the only alternative theory to his guilt, the absence of explanation could be taken into account In the present case, taking the proved facts together, we are unable even to speculate about any alternative theory which is compatible with the innocence of the accused. Learned counsel for the accused stresses that the weapon of offence has not been found, or traced to the possession of the accused. But the medical evidence proves that the weapon could well have been a simple pen-knife. It is difficult to see how there is any requirement to complete the links of the chain, that prosecution should prove that the accused used such a weapon, or how he later dealt with it. If someone else was responsible for this murder, that is a fact upon which the accused alone could throw any light, for we accept the facts as established that the accused disappeared with the infant that night, and that he was seen carrying the infant, sometime before the murder, at or about the locality of offence, and further that his blood-stained dhoti was later recovered from the scene of offence.

We must thus hold that the guilt of the accused was fully established on the evidence, and, indeed, proof of guilt in such cases, where the several links of a chain together establish the guilt of the accused, could be upon a far stronger basis than any direct evidence. We have therefore no hesitation in confirming the conviction for murder.

The learned Sessions Judge has thought fit, in this case, to impose the lesser penalty of imprisonment for life, upon grounds which do not commend themselves to us. The learned Judge refers to the perverted sense of family honour which has actuated the accused to commit this crime. That certainly has been the motive in the present case, but we are quite unable to see how it could be regarded as a mitigating circumstance. The offence was brutal and callous, and there is no suggestion of insanity, or mental imbalance amounting to such a state. We hence consider that the penalty of death should have been awarded in this case, though we do not propose to interfere with the sentence, in the absence of any appeal by the State from the sentence actually imposed. But we are constrained to make these observations, particularly in the context of a reference made by the Sessions Judge under sections 401 and 402, Criminal Procedure Code, to reduce the sentence of imprisonment for life to imprisonment for a lesser term of seven years. We would therefore confirm the conviction and sentence of imprisonment for life and dismiss this appeal.

V.S. *Conviction confirmed. Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Kuppanna Gounder and others .. *Appellants**

v.

Peruma Gounder and others .. *Respondents.*

Hindu Law—Surrender by widow—Validity of—Essentials for.

It is now well settled that a surrender by a Hindu widow of her estate in order to be valid as such should be a *bona fide* one of the entirety of the estate in favour of the nearest reversioner or body of reversioners. Where a surrender is followed by a gift to the widow's nominee it is possible to conceive of three classes of cases, *viz.*, (*a*) where the surrender and the subsequent gift are independent transactions ; (*b*) where the surrender and the gift are parts of the same transaction and the reversioner making a gift of a portion of the estate surrendered in favour of a nominee of the widow ; and (*c*) where the surrender and the gift are parts of the same transaction, but the gift is of such a small or reasonable portion of the estate surrendered and the gift is to a temple or charity or a relation of the family.

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* Appeals Nos. 286 and 376 of 1955. 26th August, 1959. (4th Bhadra 1881, Saka).

1. (1917) 43 I.C. 605 : A.I.R. 1918 Mad. 111 : 19 Crl. L.J. 189.

Whether an arrangement under which a portion of the property surrendered is given to a person who is not a stranger to the family at the instance of a widow, would be held to be a device to divide the estate between the reversioner and the widow's nominee, cannot be decided on the basis of the relationship which the nominee of the widow bears to the family of the reversioners. The real test will be whether the surrender is of the entire estate or whether under the guise of a surrender a portion of the property is diverted from the reversioners to a person who is not a reversioner and an element of transfer would be involved in the transaction, in which case it could not be a valid surrender.

Rami Reddi v. *Rosamma*, (1955) An. W.R. 393, followed.

Venktateswaralu v. *Chellaiya*, (1953) 1 M.L.J. 167, observations held too wide.

Case-law reviewed and discussed. Principles stated.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore, dated 17th December, 1954 and passed in Original Suit No. 144 of 1952.

The Advocate-General (*V. K. Tiruvenkatachari*) and *G. R. Jagadisan*, for Appellants and

T. M. Krishnaswami Ayyar, A. Balasubramanian, S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondents in Appeal No. 286 of 1955.

S. Mohan Kumaramangalam and *S. Gopalaratnam*, for Appellants and

A. Balasubramanian, for Respondents in Appeal No. 376 of 1955.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—These appeals arise out of the decree in O.S. No. 144 of 1952 on the file of the Sub-Court, Coimbatore. Defendants 1, 3, 4, 6, 7 and 9 are the appellants in the former appeal, while defendants 2 and 8 are the appellants in the latter. The suit was laid for a declaration of title of the plaintiff-respondents 1 and 2, to the suit properties, and for delivery of possession, with past and future mesne profits.

One Pongaliappa Goundan, who owned the suit properties, died in the year, 1906, leaving him surviving his mother, Marakkal, and his sister, Kaliakkal. On his death, his mother succeeded to his properties. In August, 1918, Marakkal entered into an arrangement with her husband's brothers, Kalianna Goundan and Peria Goundan, who were then the presumptive reversioners to the estate of Pongaliappa. The arrangement is evidenced by Exhibits A-2, A-3 and A-4. Exhibit A-2 dated 2nd May, 1918, purports to be a deed of " conveyance, known as release deed " executed by Marakkal in favour of the reversioners, Kalianna and Peria. The document, to the terms of which we shall have to refer later, divided the entire properties of Pongaliappa into two Schedules A and B, and recited that as the reversioners had agreed to transfer absolutely the properties set out in Schedule B to Kaliakkal, the widow surrendered the properties in Schedule A in favour of the reversioners. Exhibit A-3, which is of the same date, is a stridhanam deed executed by the two reversioners and Marakkal in favour of Kaliakkal, whereby the latter was given absolutely the properties described in Schedule B to Exhibit A-2. Two days thereafter Kaliakkal, the donee under Exhibit A-3, effected a settlement, Exhibit A-4 creating in favour of her mother, Marakkal, an interest for life in 1 acre of Nanja land and in a house, the settlor and her heirs being declared entitled to the reversion. The three documents, undoubtedly, formed part of a single transaction.

The arrangement was admittedly acted upon, and the parties took possession of the properties, and were in enjoyment of the same. Kaliakkal died in the year, 1948, leaving behind her the first and second respondents, her sons, and a daughter. Some time prior to her death, she executed a will, Exhibit B-2, under which she bequeathed her properties to respondents 1 and 2 and to her grandsons through a predeceased son. It is in evidence that the legatees accepted the will, and entered into possession of the properties devised thereunder. Even before the death of Kaliakkal, Act II of 1929 had been enacted, under which the sister and after her, her sons, would precede the father's brother as heir of a deceased person. Marakkal died in 1951. Respondents 1 and 2 who would be the nearest heirs to the estate of

Pongaliappa by reason of Act II of 1929, claimed the inheritance after repudiating the binding nature of the surrender and the allied transactions effected in 1918 and also the will of Kaliakkal, and a suit was filed against the representatives of Kalianna and Peria who were by then dead, for declaration of their title, possession of the properties and mesne profits.

The appellants contested the claim. They pleaded that Exhibit A-2 was a valid surrender of the properties by Marakkal in favour of the then nearest reversioners to the estate of the deceased Pongaliappa, and that there was nothing left for respondents 1 and 2 to succeed on the death of Marakkal. They also pleaded that the respondents, having accepted and taken under the will of Kaliakkal, were estopped from disputing their title.

The learned Subordinate Judge held that Exhibits A-2 to A-4 were invalid as amounting to a device to divide the estate of Pongaliappa between Marakkal's nominee and the reversioners, and that the appellants were not estopped from claiming the inheritance. He passed a decree declaring the rights of respondents 1 and 2 to the properties and directing possession to be delivered to them with mesne profits, the quantum of the latter being left for determination at a latter stage. The decree is the subject-matter of the above appeals.

The substantial question in the appeals relates to the validity of surrender by Marakkal as evidenced by Exhibit A-2. Pongaliappa left 2.75 acres of nanja land, 13.5 acres of punja land, a tiled house, two thatched houses and a vacant site. Under Exhibit A--2 these properties were divided into two Schedules A and B ; the former was surrendered to the reversioners, the latter was the subject of gift to Kaliakkal. Exhibit A-2 states :—

> " I have also got the right to enjoy the entire properties mentioned herein till my lifetime. You (reversioners) are entitled to get the said properties after my lifetime. I have now got a daughter, aged 30 years by name Kaliakkal. Whereas I have requested you that I should convey some properties to the said Kaliakkal, and as you have consented to the effect that if I even now release my right of enjoying till my lifetime the properties mentioned in A Schedule out of the A and B Schedule properties set forth hereunder and now remaining in my possession, and deliver (the same to you), you shall have no objection whatever for myself and yourselves jointly giving the properties mentioned in the B Schedule to my daughter Kaliakkal. We, three individuals, have, consenting to this, executed the stridhanam deed on separate stamp papers in favour of my daughter Kaliakkal in respect of the properties set forth in Schedule B. So, as consideration therefor, I have not only delivered possession to you of the properties mentioned in A Schedule which have been in my possession on this date, but also I have released my right of enjoying the same till my lifetime."

The properties given to the reversioners, namely, those set out in Schedule A, were of an extent of 13 acres and 5½cents of punja lands, two thatched houses and a vacant site. They were valued at Rs.3,000. The properties given to Kaliakkal, specified in Schedule B to the document, comprised the entire nanja lands, together with the tiled house of 20 anganams. They were also valued at Rs.3,000. The provision for the maintenance of Marakkal under Exhibit A-4 was made out of B Schedule properties, but the properties were to revert to Kaliakkal on the death of the former. *Ex facie* what the reversioners obtained under Exhibit A-2 was only one-half of the properties. Evidence was let in on behalf of respondents 1 and 2 that the properties set out in Schedule B to Exhibit A-2 were of greater value than those in Schedule A. Reliance was placed on such evidence by their learned advocate to show that what was surrendered was even less than half the estate. On the other hand, the learned Advocate-General, appearing for the appellants, urged before us that a substantial portion of the value of the B Schedule properties would represent the residential house of 20 anganams, and that the value of the nanja lands given to Kaliakkal, which was subject to Exhibit A-4, would be only a fraction of that which was surrendered and, that would be reasonable gift in the circumstances of the case. There is, however, no evidence to fix the relative values of the house and nanja lands. Even otherwsie we see no reason to exclude the value of the house in the computation of the respective values of the properties given to Kaliakkal and those surrendered to the reversioners. In our opinion, it would be safe to accept that the two sets of properties were of equal value, as stated in the document.

There is intrinsic evidence in the documents themselves to show that Exhibit A-3 was first executed and Exhibit A-2 later. This was perhaps a precaution taken by Marakkal, to avoid the possibility of the reversioners failing to implement fully the arrangement, if the properties were to be surrendered to them first. It cannot, therefore, be held that the gift to Kaliakkal was made by the reversioners independently of the deed of surrender. Exhibit A-3 states :

" Whereas your mother has desired that the properties mentioned herein should be given to you, her daughter, as stridhanam properties, and whereas we have consented thereto, we have hereby delivered to you these properties as stridhanam and have delivered possession of the same to you on this date. Hereafter neither ourselves nor our heirs shall have any right whatever in these properties. You yourself shall hold and enjoy the same absolutely."

The recitals in Exhibits A-2 and A-3 make it obvious that in pursuance of a pre-arranged plan, the reversioners were given one-half of the properties of Pongaliappa by way of surrender in consideration of their agreeing and in joining in the gift of the other half to Kaliakkal.

The learned Advocate-General, contended that the arrangement entered into under Exhibits A-2, A-3 and A-4 should be viewed as a whole, as effecting a *bona fide* surrender of the entire properties in favour of the nearest reversioners, and that such reversioners, having become owners as a result of the surrender, conveyed the B Scheduled properties to Kaliakkal. He further contended that it could not be held that there was any division of the estate, as what was effected was a surrender and a gift of a portion to one who could be said to be a member of the family and not a stranger and that a transaction by which the widow obtained only a reasonable provision for maintenance could not be held to be a device to divide the estate, merely for the reason that some portion of the property was given to the sister of the last male owner, who could not properly be said to be a nominee of the widow, she being related to the reversioners as well.

It is necessary, therefore, to consider the essential features of a surrender, in order to ascertain whether an arrangement, which purports to divide the properties between the reversioner and a person who could be held to be not merely a nominee of the widow but one in whom the reversioners themselves, could be said to be reasonably interested, would be valid.

In *Sureshwar Misser* v. *Maheshrani Misrain*[1] the Privy Council held that two conditions should be fulfilled to make a surrender by a widow, with the consent of the next heir valid, namely, that (1) the surrender must be total and not partial, and (2) that it must be a *bona fide* one and not a device to divide the estate with the reversioners. Elaborating the second point, Lord Dunedin observed :—

" Now Their Lordships do not doubt that to make an arrangement such a device, it is not necessary that the lady surrendering should take part of the property directly. An arrangement, by which the reversioners as a consideration for the surrender promised to convey a portion of the property to a nominee or nominees of the lady surrendering, might well fall under the description of a device to divide the estate."

Where there is a surrender followed by a gift to the widow's nominee, it is possible to conceive of three cases : (1) where the surrender and the subsequent gift in favour of the widow's nominee were independent transactions ; (2) where the surrender and gift are parts of the same transaction, the reversioners making a gift in favour of the nominee of the widow of a portion of the estate ; and (3) where the surrender and gift are parts of the same transaction, but the gift is of such a small or reasonable portion of the estate surrendered, and the object of the gift is not a total stranger to the family, or is a temple, or is one for charity.

(1) The surrender having accelerated the succession of the reversioners, they would be fully competent to dispose of the properties as they pleased, and the fact that they made a gift to the nominee of the widow could not detract from the validity

1. (1921) I.L.R 48 Cal. 100, 108 : 39 M.L.J. 161 : L.R. 479 I.A. 233.

of surrender. The observations of the Supreme Court in *Mumma Reddy* v. *Durairaju Naidu*[1] should be taken to relate to a case under this category. Mukerjee, J., observed at page 664 that it would be consistent with established principles for a widow to surrender her interest and for the reversioner after gift vesting transferring a portion of the property to a stranger, and in such a case the title of the stranger would be from the reversioner. That the observations do not relate to a case where the gift and remainder are part of the same transaction is made clear by an earlier observation of the learned Judge, at page 662 :—

> " It is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation."

The question whether the transactions of surrender and gift were independent of each other would depend on the facts of the particular case.

(2) Taking the second category of cases, mentioned above, reference was made to two decisions of this Court. *Chella Subbiah Sastri* v. *Paluri Pattabiramayya*[2], was a case where a widow conveyed the whole of her limited estate to the nearest reversioner, in consideration of an undertaking by such reversioner that he would re-convey a portion of such property to a person named by the widow. The conveyance was held to be valid and not vitiated by reason of the undertaking on the part of the reversioner. Sankaran Nair, J., observed that the validity of the renunciation by the widow was independent of the validity of the agreement as to the subsequent disposal of the property by the alienee. It was also held that the motive of the widow in making the surrender would not affect the validity of the surrender. The authority of this decision has been considerably shaken by the decision of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan*[3]. But it was contended that the decision, not having been expressly overruled, should be treated as good law, so far as it was consistent with the principles, namely, so long as there has been no division of the estate in the manner aforesaid. *Venkateswarlu* v. *Challaiya*[4], viewed such an agreement as constituting the motive of the widow in renouncing her husband's estate in favour of the nearest reversioner, and it was held that such a motive could not be taken into account in determining the validity of surrender, and where a surrender was of the widow's entire interest in her husband's property, save for a provision for her maintenance, the mere fact that a relation of the widow was provided by virtue of the arrangement could not affect the validity of the surrender. In that case, as a part of surrender by the widow, there was a sale by the reversioner in favour of her brother, who later transferred the property to his sons. The sale purported to be one for consideration, and the learned Judges held that the consideration was binding on the estate as a major portion thereof was utilised for making the provision for the maintenance of the widow. The decision of the case did not entirely rest on that circumstance. The learned Judges considered the question even on the footing that the sale to the widow's brother was treated as a gift. Krishnaswami Nayudu, J., observed at page 171 :—

> " The surrender must be complete and effective and not colourable and nominal. If the transaction of surrender is a relinquishment of her entire interest in her husband's property and if such relinquishment is in favour of the nearest reversioner and so long as it is not in any way indicated that the arrangement evidenced by the surrender between the widow and the reversioners allows a benefit to accrue to the widow excepting a provision for maintenance, it must be held that that should be sufficient to stand the test of a valid surrender......These are cases where along with suitable provision for maintenance she may desire that a near relation of hers may also be provided for. These are considerations which generally weigh with a Hindu widow to renounce her estate. The fact that not only she desires to be free from the trouble of administering the estate but also desires to provide for a relation for whom she might have some affection, and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes to make such a provision, cannot characterise the surrender as not a *bona fide* one."

With great respect to the learned Judges, we are of opinion that the law has been too widely stated to be accepted without qualification. But for the fact, that the obser-

1. (1952) 1 M.L.J. 746 (S.C.): (1952) S.C.J. 192 : 1951 S.C.R. 655 (S.C.).
2. (1908) I.L.R. 31 Mad. 446.
3. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
4. (1953) 1 M.L.J. 167.

vations which we have extracted above were substantially in the nature of an *obiter*, we would have referred the matter for consideration by a Full Bench.

In *Sureshwar Misser* v. *Maheshrani Misrain*[1], the Privy Council held that a device by which the reversioner as a consideration for the surrender conveyed a portion of the property to a nominee of the widow might well fall under the description of a device to divide the estate. The nominee need not necessarily be a *benamidar* for the widow, for that case would be one where the widow herself would take the benefit. It would follow that the inhibition against the division of the estate would apply even where the nominee and not the widow takes a portion of the property surrendered. The learned Judges in *Venkateswarlu* v. *Challaiya*[2], have given two reasons in support of their conclusion : (1) the reversioners having themselves agreed to the request of the widow to part with a portion of the property such a gift to widow's nominee should be deemed to be for justifiable reasons, and as nothing would prevent the reversioners from acceding to the request of a widow ; and (2) the motive of the widow making the surrender is immaterial. The first ground cannot possibly validate a gratuitous transfer. Consent of the reversioners to an alienation by the widow does not by itself validate an alienation by her but they afford evidence of its necessity. There can be no necessity in the case of a gratuitous transfer. The surrender and the gift could not be justified on this principle. Such consent by the reversioner, being procured by the inducement of a surrender to him of the rest of the properties, might have been t e result of improper motive and could not be taken as a proper consent. The rule that the motive of the surrendering widow is immaterial to judge its validity is no doubt fairly well established ; but where a surrender is made on the understanding that the reversioners should divide the property with the widow's nominée, the case is not one of mere motive but one of a contract or stipulation. Such a contract would have the effect of making the surrender in substance a partial one, or one effecting a division of the estate.

But the question would still remain whether an arrangement under which a portion of the property is given to a person who is not a stranger to the family, *e.g.*, a daughter, at the instance of the widow, could be held to be a device to divide the estate between the reversioner and the widow's nominee. The learned Advocate-General drew our attention to several cases where a surrender was held to be bad as amounting to a device to divide the estate and pointed out that in all of them the nomi ee had been a stranger to the family. From this it was contended that a stipulation at the time of surrender for a gift in favour of one who was a member of the family could not strictly be called as sharing the estate with the nominee of the widow. The cases to which reference was made were : *Govinda Prasad Vasudeva Tiwari* v. *Sivalinga Sivalingappa Chappalli and others* (son-in-law)[3], *Siva Subramania Pillai and another* v. *Piramu Ammal* (daughter and son-in-law as co-tenants)[4], *Ramratanlal and others* v. *Gangotri Prasad and others*[5], *Reddi Krishnamurthi* v. *Reddi Seshayya*[6], *Venkateswaralu* v. *Challaiya* (brother's son)[7], *Manjilal* v. *Jaganadhan Ram* (son through another husband)[8].

We are of the opinion that the matter cannot be decided on the basis of relationship which the nominee of the widow bears to the family of the reversioners, but on a different aspect of the matter, *viz.*, whether the surrender satisfies the test that it is a surrender of the entire estate. A surrender can only be to the nearest reversioner : it does not involve any transfer of title to any person, as it only effects an acceleration of the inheritance to the last male owner. Where, therefore, under the guise of a surrender a portion of the property is diverted from the reversioners to a person who is not a reversioner, an element of transfer would be involved in the transaction ; that could not, properly, be a surrender.

The principle on which a surrender by the holder of a woman's esate rests is that there has been an effacement of the widow *quod* the estate of her husband (or the

1. (1921) 39 M.L.J. 161: L.R. 47 I.A. 233: I.L.R. 48 Cal. 100.
2. (1953) 1 M.L.J. 167.
3. A.I.R. 1931 Bom. 107.
4. (1925) 49 M.L.J. 128 : A.I.R. 1925 Mad. 1111.
5. A.I.R. 1935 All. 73.
6. (1944) 1 M.L.J. 443.
7. (1953) 1 M.L.J. 167.
8. A.I.R. 1953 All. 78.

last male holder), like an effacement which is effected by actual or civil death or remarriage. Although it cannot be said that she is dead, for all purposes, for consistently with a surrender she can hold her own p operties, it would nevertheless mean, that it has the effect of opening the succession to the estate of the last male owner in respect of which she surrendered in favour of his next heir as on that date. *Rangaswami Goundan* v. *Nachiappa Goundan*[1], likened a surrender to a voluntary act operating on the widow's death. There cannot, therefore, be a partial surrender, as no person could be said to have effaced herself when she has only partly done so. Thus, in *Sureshwar Misser* v. *Maheshrani Misrain*[2], it was held that the surrender must be total and not partial. In *Natyarlal Punjabhai* v. *Dadhubhai*[3], Mukherjea, J., observed :—

> " The presumptive reversioner has got no interest in the property during the lifetime of the widow. He has a mere chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment. The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living, step in at once under the ordinary law of inheritance."

It was further pointed out that a surrender was not an alienation by a widow of her right, and it conveyed nothing in law, but merely caused an extinction of her rights in her husband's estate. It would follow that the surrender should be total and of the entire property (and an exception is made in regard to the reservation of small portion of the property for the widow's maintenance). An arra igement by which, a portion o" the property is given to a nominee of the widow would mean that the surrender is made only of the remaining portion of the property, and not of the entire estate. We have already referred to a case where if there had been a *bona fide* surrender by a widow of the entire property in favour of the nearest reversioner, the latter, after becoming the owner of the property, could dispose of it as he pleased, and, if he chose to benefit a relation, or a nominee of the widow, it would make no difference to the validity of the transaction. That would be a case, where the transaction of surrender is distinct from the transaction of the subsequent gift by the reversioners ; such a gift should be the result of his own voluntary act.

But where the surrender and the gift by the reversioner are part of the same transaction, or where the former is made on condition of, or as a consideration for the latter, it cannot be held to be a surrender of the entire estate. In *Kottayya* v. *Veerayya*[4] a widow made a gift of all the immoveable properties left by her husband in equal shares to her own sister's son and the son of one of her husband's brother's son, reserving a small portion for her maintenance. That transaction was followed up by a release by the reversioners in favour of the donees on receiving certain consideration. It was held that the transaction was a device to divide the estate between the reversioners and the widow, and that the gift was invalid. In *Krishnamurthi* v. *Seshayya*[5] a widow made a surrender of the properties in favour of the reversioner ; as a part of the transaction, the surrender purported to convey some of the properties obtained by him to certain persons *benami* for the brother's son of the widow ; and the ransactions wer held to form part of the same arrangement. It was also held that the surrender was not a *bona fide* one, but was a mere device to divide the estate. The learned Judges who decided *Venkateswarulu* v. *Challaiya*[6], held that the two decisions referred to above should be confined to the facts of the respective cases. We cannot however, agree that these two decisions can be distinguished in that manner.

The decision in *Venkateswarlu* v. *Challaiya*[6], was considered by the Full Bench, of Andhra High Court in *Rami Reddi* v. *Rosamma*[7]. Subba Rao ,C.J., as he then was summarised the position thus :—

1. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523.
2. (1921) 39 M.L.J. 161 : L.R. 47 I.A. 233: I.L.R. 48 Cal. 100.
3. (1954) 1 M.L.J. 69 : (1954) S.C.J. 34 : 1954 S.C.R. 339, 347.
4. 1923 M.W.N. 679.
5. (1944) 1 M.L.J. 443.
6. (1953) 1 M.L.J. 167.
7. (1955) An. W.R. 393, 400 : A.I.R. 1955 Andhra 232 (F.B.).

"Widow can elect herself to accelerate succession. In that event same legal consequences will flow as if she were dead. The succession opens and the next reversioners will inherit the property as they would on her death. It is, therefore, inherent in the doctrine that the relinquishment should be in respect of the entire property for the benefit of the entire body of next reversioners. The said result can be effected by any process. The form is immaterial but the substance matters. Though in form the transaction purports to give the entire property to the next reversioners, if it is a cloak to cover a pre-arranged plan of partition between the widow and the reversioners, it would not be valid for the simple reason that the entire estate of her husband was not made available to the reversioners. So too, if the surrender is effected pursuant to a scheme of partition between the reversioners and the nominee of the widow, it would be bad for two reasons. It was a device to divide the estate between the widow's nominee and the reversioner. It would also be invalid because in substance the entire property was not given to the reversioner but a part of it to the reversioner and the other part to her nominee. This result would be inconsistent with her self-effacement, for, on her self-effacement, the reversioners should get the entire property. In either case, it would not be a *bona fide* surrender of entire estate to the nearest reversioners. If the surrender is *bona fide*, that is, if it is in effect and substance a complete self-effacement of the widow in the sense succession to the entire property opens to the reversioners, the motives operating on the mind of the widow would be irrelevant."

We respectfully agree with the foregoing statement of the law. In our opinion, where a surrender and a gift of virtually a half of the estate are part of the same transaction, there would be no distinction in principle between a case where under the impugned arrangement properties were given to a relation of the widow, and a case where the properties were given to her nominee who, in addition, occupies the position of the member of the family of the last male-holder.

The third category of cases to which we have made reference is one where the entire estate is surrendered, but, as a part of the transaction, a reasonable portion of the estate is given by way of gift to a nominee of the widow. It is possible to conceive of cases where the widow honestly considers that a gift of a small portion of the property should be made to an indigent daughter or other member of the family, or to a temple or for a charitable purpose. The very reasonableness of the provision, having regard to the value of the estate, would imply that the surrender was substantially of the whole estate, and that there was no attempt or device to divide it. Further, it may imply that the reversioners themselves voluntarily gave it, independent of any stipulation by the widow. We consider that in such cases it cannot be said that the surrender was either partial or intended as a device to divide the estate. Such a surrender would be valid, notwithstanding the gift of a reasonable or small portion of the estate to a nominee of the widow who was no stranger to the family, or in furtherance of a religious or charitable purpose. But in the present case the gift to Kaliakkal was practically one half of the estate and cannot be said to be of a reasonable portion of the estate. On the principles of the decisions, to which we have made a reference, it follows that the transaction evidenced by Exhibits A-2 and A-3 would amount to a division of the estate between the reversioners and Marakkal's nominee and would not be binding on respondents 1 and 2.

On behalf of the respondents it was contended that Exhibit A-2 amounted to an alienation and not a surrender and should be judged on that basis. According to that contention the widow agreed to convey what she styled as her life interest in the properties set out in A Schedule in consideration of the reversioners conveying to her daughter all the B Schedule properties by way of gift. The learned counsel for the respondent relied on the recitals in Exhibit A-2, and also on the circumstance of Marakkal joining in the execution of Exhibit A-3. In our opinion, the three documents Exhibits A-2, A-3 and A-4 should be treated as part of the same transaction, under which, in pursuance of the pre-arranged plan, there was a division of the properties into two equal shares, one share to be taken by the reversioners as a result of the surrender by the widow, and the other share to be taken by the widow's nominee, namely, her daughter, Kaliakkal. The transaction could only be a surrender, though a partial one of the estate of the last male owner, and it could not be split up and viewed as an invalid conveyance by the widow.

The learned Advocate-General contended that respondents 1 and 2 were either estopped or, should be deemed to have elected to accept a title inconsistent with the

title as reversioners, and could not, therefore, sustain the suit. The basis for this contention was that respondents 1 and 2 accepted the testamentary disposition, Exhibit B-4, of their mother, Kaliakkal, in their favour of the properties which she obtained under Exhibit A-3. In support of that contention, the decision in *Sahu Mado Das* v. *Mukand Ram*[1], was relied on. In that case, a widow was in possession of the estate of her husband. By an arrangement between her and the daughters the properties were divided between the daughters and their sons. The plaintiff in the case, a daughter's son, was one who obtained some advantage under the arrangement. The arrangement was made on the footing that the widow had an absolute right which the daughters acknowledged, and in return, they and their sons were given separate portions of the property. The Supreme Court held that the plaintiff in the case was not estopped from claiming the properties on the footing that he was reversioner to the estate of the last male owner, but that he would be precluded by the principle of election, whereby a person, with full knowledge of his rights, by electing to assent to the transaction avoidable at his instance was precluded from going back on that election and avoid it at a later stage. In *Lalitha Kumari Devi* v. *Raja of Vizianagaram*[2], it was held that a person who specifically and expressly released his rights under the deed could not take any benefit under the provisions of it, as he could not be held to affirm and disaffirm the deed at the same time, and that he who accepted the benefit under the deed must adopt the whole contents of the instrument.

In the present case, respondents 1 and 2 were not parties to the arrangement of the year 1918. There can be no estoppel against them. Kaliakkal was, no doubt a party. Under that arrangement, she received a benefit, in that she obtained the properties set out in Schedules B to A-2. When Kaliakkal became the reversioner after passing of the Act II of 1929 it would be doubtful whether she would have been precluded by reason of transaction entered into at a time when she was not even a reversioner. But assuming that to be so, the ultimate reversioners could not be estopped. The transaction, at best, would be binding on the widow and Kaliakkal. The interest which the latter obtained would enure for the life of Marakkal, that is, till 1951. She would be entitled to dispose of that interest and the acceptance of her disposition would estop the legatee only to the extent to which Kaliakkal herself was estopped. Kaliakkal's representatives would be entitled to enjoy the properties for the duration of Marakkal's lifetime, that is, till the year 1951. The rights of respondents 1 and 2, as reversioners to the estate of Pongaliappa, accrued only in 1951 on the death of Marakkal. Till that time, they did not have two inconsistent titles to choose from. They took only the properties left by Kaliakkal which could be deemed to be given only for the duration of Marakkal's lifetime. When they accepted the will of Marakkal, they could not be said to have elected between the two inconsistent rights for the simple reason that the two rights did not exist simultaneously. No election would, therefore, arise, in this case. Nor can there be any estoppel, as it could not be said that the appellants, in any way, altered their position by reason of the respondents 1 and 2 taking under their mother's will. In *Rangaswami Goundan* v. *Nachiappa Goundan*[3], one Marakkammal was in possession as heir of her deceased son. She gifted certain properties of her son to one Ramaswami. The first defendant to the action and his brother inherited from Ramaswami that property. The plaintiffs in the case were the actual reversioners at the time of Marakammal's death. Before that time, the plaintiffs purchased the two items of lands from the first defendant and his brother who claimed title under the widow's gift. He also advanced a sum of Rs. 8,000 on the mortgage of the lands covered by the gift. A question arose whether the plaintiff, having taken the mortgage from the alleged surrenderee's representative, could repudiate the surrender. The Privy Council observed that, at the time of the mortgage, the plaintiff could not know whether he would be such a reversioner

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1. (1955) 2 M.L.J. 1 : (1955) S.C.J. 417 : (1955) 2 S.C.R. 22.
2. (1954) 66 L.W. 231.
3. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.).

He was, therefore, held entitled to take the mortgage, and that by doing so, he was not barred from asserting his own title when the succession opened.

It was finally contended on behalf of the appellants that the respondents would be precluded by the maxim of *ex turpi causa non oritur actio*. We cannot see how that maxim would apply to this case. An alienation by a widow is not wholly void. It would be open to the reversioners to assent to it, or avoid it. The fact that Kaliakkal assented to it would not make her a party to any unlawful act, for there was none. Further, respondents 1 and 2 do not claim under Kaliakkal, and the maxim cannot apply to this case either for the reason that there was nothing unlawful in Marakkal entering into the arrangement with the reversioners under Exhibit A-2, or for the reason that respondents 1 and 2 do not claim under Marakkal or Kaliakkal.

The result is that the decree of the lower Court is correct. The appeals fail, and are dismissed with costs. One set.

R.M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTANARAYANAN.

Nallathangal .. *Petitioner**

v.

Nainan Ambalam .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *sections* 435 *and* 439—*Finding of fact—Order dismissing Hindu wife's petition against husband under section* 488 (1)—*Finding that wife was validly divorced from her husband by caste panchayat—Interference in revision.*

Hindu Law—Divorce—Custom in community recognising divorce—Validity of divorce.

Where a magistrate makes an order dismissing a Hindu wife's petition against her husband under section 488 (1), Criminal Procedure Code, on a finding of fact that the petitioner had been actually divorced from her husband by virtue of a caste panchayat and that there was no subsisting marriage between the parties, the High Court will not be justified in criminal revision in interfering with such a finding.

Hindu Law no doubt does not recognise a divorce, but custom in particular communities permits a valid divorce by means of a caste panchayat or other similar tribunal. Such customary divorces continue to have the force of law among the communities where the custom prevails.

It cannot be laid down as a general proposition of law that, unless both the parties have specifically agreed, a divorce granted by a caste panchayat would be against public policy and could not be enforced by Courts.

Keshav Hargovan v. *Bai Gandhi*, (1915) I.L.R. 39 Bom. 538 and *Thangammal* v. *Gengayammal*, (1945) 1 M.L.J. 299, referred to.

Petition under section 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-Divisional Magistrate, Dindigul, dated 8th December, 1958 and made in M.C. No. 211 of 1958.

V. C. Veeraraghavan, for Petitioner.

K. Narayanaswamy Mudaliar, for Respondent.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—The Revision Petitioner in this case is a wife whose proceeding under section 488 (1) of the Code of Criminal Procedure was dismissed by the learned Sub-Divisional Magistrate of Dindigul upon a finding of fact that the petitioner had been actually divorced from her husband by virtue of a Caste Panchayat, and that there was hence no subsisting marriage.

* Crl. R.C. No. 141 of 1959. 19th August, 1959. 20th Sravana 1881—Saka.

It is not in dispute before me that, though Hindu Law does not recognize a divorce between husband and wife, marriage being regarded as an indissoluble sacrament, nevertheless, the custom in certain communities may be widely different, permitting a valid divorce by means of a Caste Panchayat or similar tribunal.

With respect to the effect of recent legislation upon this matter, that is, the Hindu Marriage Act XXV of 1955, the question seems to have come up in this Court, and the decision is briefly reported. In re *Parvathi Ammal*[1] Ramaswami, J., held that the customary rights of divorce were saved by section 7 of Madras Act VI of 1949, and that such divorces continue to have the force of law among the communities, where the custom prevailed. In the present matter, it is not denied that there is such a custom among the Ambalagars, and the finding of fact must be upheld that the revision petitioner and her husband were actually divorced by means of such a Caste Panchayat. The precise grounds upon which this divorce was granted, the particular party or parties who took the initiative in this matter, and the precise attitude of the husband and wife towards the Caste Panchayat, are details, into which we cannot proceed here. In fact, the record is not adequate upon this aspect, since it was not directly in issue.

What is now urged before me, upon the strength of an observation in *Thangammal* v. *Gengayammal and others*[2], and also upon the strength of a decision of the Bombay High Court in *Keshav Hargovan* v. *Bai Gandi*[3], which has been referred to in Mulla's text-book on Hindu Law, is that unless both the parties had specifically agreed, a divorce granted by a Caste Panchayat would be against public policy and could not be enforced by Courts. The proposition seems to me to be far too wide for acceptance.

The decision in *Thangammal* v. *Gengayammal and others*[2], is not an authority in any such wide proposition and there is only an incidental observation upon this. The proposition would necessarily imply that a Caste Panchayat would have no jurisdiction to proceed into matrimonial offences, where they are advanced as the ground or the cause of the divorce, in which contingency it is very probable that the spouse against whom the accusation is made might deny it. In any event, I do not think there is any justification for this Court to interfere in Criminal Revision, upon a point of this character. It is always open to the revision petitioner (wife) to sue for maintenance in a Civil Court and the question could then be properly gone into whether by virtue of the customary divorce, the marriage has ceased to subsist, or her matrimonial status continues notwithstanding the Caste Panchayat decision, and whether she consented to the decision of the Caste Panchayat. The revision petition is accordingly dismissed.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Coonoor Mosque by Secretary, Ismail Usman Sait .. *Petitioner**

v.

M. G. Abdul Hamid Sahib and another .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIX of 1955), *Schedule II, Article* 10 (*k*)—*Court-fees payable on application before Sub-Court under section* 7 (2) *of the Rent Control Act.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2)—*Application under—Court-fee payable—Rent Controller—If a Court.*

An application under section 7 (2) of the Madras Buildings (Lease and Rent Control) Act, 1949, for eviction of a tenant, made before the Subordinate Judge as Rent Controller, is liable to be affixed with a Court-fee stamp of Re. 1 under Article 10 (*k*) (1) of Schedule II to the Madras Court-fees

1. (1957) M.W.N. (Cr.) N.R.C.4.
2. (1945) 1 M.L.J. 299.
3. (1915) I.L.R. 39 Bom. 538.

* C.R.P. No. 1853 of 1959.

28th November, 1959.
(7th Agrahayana, 188—Saka.)

and Suits Valuation Act. The Court-fee payable is not to be determined with reference to the office which the officer, who has been appointed as the Controller holds, nor could the Rent Controller (even though he may be a judicial officer) be deemed a Court for purposes of Court-fee.

Petition under section 12-B of Act XXV of 1949 (Madras) praying the High Court to revise the Order of the Court of the Rent Controller, (Subordinate Judge) of the Nilgiris, Ootacamund, dated 12th September, 1959 and made in unfiled H.R.C. Petition C.F.R. No. 8737.

P. S. Ramachandran and *P. S. Balakrishnan*, for the Petitioner.

G. Ramanujam, for The Government Pleader (*K. Veeraswami*), on behalf of the State.

The Court made the following

ORDER.—The Subordinate Judge of the Nilgiris at Ootacamund, is the Controller for that area, appointed under the Madras Buildings (Lease and Rent Control) Act of 1949. The petitioner filed two applications before the Subordinate Judge and Rent Controller under section 7 (2) of the Act, to evict certain tenants from the premises of which they were in occupation. On each of those applications, the petitioner affixed a Court-fee stamp of the value of Re. 1. The Subordinate Judge directed him to pay a Court-fee of Rs. 5 on each application. The petitioner contends that this demand is not in accordance with law and has come to this Court in revision.

Applications of the kind which the petitioner filed before the Rent Controller, the Nilgiris, can be brought only under one or other of the following three categories in Schedule II to Madras Act XIV of 1955 :

(1) Article 10 (*k*) which runs as follows :—

" *Particulars.*	*Proper fee.*
10. (*k*) Application or petition not falling under clause (*i*) or (*j*) and presented to a public officer or in a public office and not otherwise provided for—	
(i) which involves the exercise or non-exercise of power conferred by law or rule having the force of law ; ..	One rupee.
(ii) in other cases ..	Four annas ".

(2) Article 11 (*g*) which runs :

"11. (*g*) Application or petition presented to any Court, or to any Magistrate in his executive capacity and not otherwise provided for in this Act. ...	Twelve annas ".

(3) Article 11 (*l*) which runs as follows :

" 11. (*l*) Original petitions not otherwise provided for when filed in—	
(*i*) A District Munsif's Court—	
(1) under the Madras Village Courts Act, 1888 (Madras Act I of 1889) ..	One rupee.
(2) in other cases ..	Five rupees.
(ii) The City Civil Court, Madras, a Sub-Court or a District Court ..	Ten rupees.
(iii) The High Court ..	Twenty rupees ".

The last item may be at once eliminated because the petitioner presented these applications in the Court of the Subordinate Judge, Ootacamund, not because he was the Subordinate Judge of the place but because he was the Rent Controller. Therefore, the provisions of the Schedule properly applicable to Courts of District Munsifs, Subordinate Judge and District Judges are not applicable in the present instance. Under the Madras Buildings (Lease and Rent Control) Act, Government can appoint any person to perform the functions of a Controller under the Act. The person so appointed may be a Tahsildar, he may be a District Munsif or he may be a Revenue Divisional Officer. In fact he may be anybody. Therefore, the Court-fee payable on applications presented under the Rent Control Act cannot be determined with reference to the office which the officer on whom the power has

been conferred holds. If the view of the learned Subordinate Judge were right he should have called for a Court-fee of Rs. 10. That he did not do and this involves an inconsistency. It is possible to argue that the present case comes under Article 11 (*g*). But then it is to be doubted whether the Rent Controller can be regarded as a Court within the meaning of that Article. If that also is eliminated, we are left only with Article 10 (*k*) under which the Court-fee payable is only Re. 1. The Court-fee paid by the petitioner is therefore correct and sufficient.

The revision petition, is therefore, allowed. No costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

The Union of India for the Government of India and on behalf of the creditors of 2nd defendant .. *Petitioner**

v.

N. Arunachalam and another .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *sections* 3 (*ii*), 41 (1) *and* 50—*Suit to set aside an order of Collector allowing a claim petition in proceedings under section* 46 *of the Income-tax Act—Valuation—Order—If an order of Civil or Revenue Court.*

Income-tax Act (XI of 1922), *section* 46 (2)—*Collector acting under—If a civil or revenue Court.*

In realising arrears of Income-tax as arrears of land revenue by virtue of the provisions of section 46 of the Income-tax Act the Collector does not constitute a Civil or Revenue Court. His adjudication on a claim petition in respect of properties attached for recovery of arrears of income-tax will not tantamount to a decision by a Civil or Revenue Court within the meaning of section 41 (1) of the Madras Court-fees and Suits Valuation Act. In suits to set aside such orders the residuary provisions, *viz.*, section 50 of the said Act could alone apply for purposes of Court-fee payable.

Section 3 (ii) of the Madras Court-fees and Suits Valuation Act contemplates four classes of Courts, civil, revenue, criminal and any authority or Tribunal having jurisdiction under any special or local law to decide questions affecting rights of parties. A Collector acting under section 46 of the Income-tax Act may be a Court within the meaning of this section. But he will not constitute a Civil Court for purposes of section 41 (1) of the Court-fees Act. Nor could the Collector be deemed a Civil Court even though he exercises the powers of a Civil Court for certain purposes in proceedings under the said section.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Salem, dated 29th September, 1958 and made in O.S. No. 93 of 1957 and the Order, dated 29th September, 1958, in O.S. No. 21 of 1958 respectively.

C. S. Rama Rao Sahib and *S. Ranganathan*, for Petitioner.

N. R. Raghavachari and The Government Pleader (*K. Veeraswami*), for Respondents.

The Court delivered the following

JUDGMENT.—The question that arises for determination in both these applications is the same, whether the Court-fee payable on the plaint in each of these cases had to be calculated under the provisions of section 41 (1) of the Madras Court-Fees and Suits Valuation Act, 1955 (Act XIV of 1955) or under the provisions of the residuary section, section 50 of that Act. The learned Subordinate Judge held that section 41 (1) provided the basis for the calculation of the Court-fee payable on each of the plaints.

Bommanna Chettiar, the second defendant in O.S. No. 93 of 1957, and Abu Bucker, the first defendant in O.S. No. 21 of 1958 were income-tax assessees. For the arrears payable by them, certificates were issued to the Collector under section

* C.R.P. Nos. 169 and 170 of 1959. 18th September, 1959.
(27th Bhadra, 1881—Saka).

46 of the Income-tax Act. To realise these arrears the Collector attached certain properties. Claims were preferred that these properties had ceased to be the properties of the assessees. These claims were allowed by the Collector, and the properties were released from attachment. The Income-tax Department thereupon filed the two suits to set aside the summary orders passed by the Collector in the earlier proceedings, which resulted in the claims being allowed and the attachments being raised. On each of the plaints Court-fee was paid by the Department as plaintiff under section 50 of the Madras Court-Fees and Suits Valuation Act. Objection was taken to that by the Court-fee Examiner, and, as I have pointed out earlier, the learned Subordinate Judge held that Court-fee was payable under section 41 (1) of the Act.

Section 41 (1) runs :

" In a suit to set aside an attachment by a Civil or Revenue Court of any property, movable or immovable, or of any interest therein or of any interest in revenue, or to set aside an order passed on an application made to set aside the attachment, fee shall be computed on the amount for which the property was attached or on one-fourth of the market value of the property attached, whichever is less ".

The suits were to set aside the orders passed on applications to set aside attachments. The attachments were effected by the Collector, and the orders releasing them from attachment were passed by the Collector.

It was obviously in exercise of the powers vested in the Collector by the proviso to section 46 (2) of the Income-tax Act that he passed the orders, the validity of which had been challenged in the suits. Section 46 (2) provides for the recovery of the arrears of income-tax as an arrear of land revenue. The proviso to section 46 (2) runs :

" Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908, a Civil Court has for the purpose of the recovery of an amount due under a decree".

In explaining the scope of the proviso, the Supreme Court pointed out in *Purushotham Govindji Halai* v. *Collector of Bombay*[1], that

" the proviso did not prescribe two alternative modes of procedure at all. All that the sub-section directs the Collector to do is to proceed to recover the certified amount as if it were an arrear of land revenue that is to say, he has to adopt the procedure prescribed by the appropriate law of his State for the recovery of land revenue and that in that proceeding he is, under the proviso, to have all the powers of a Civil Court as under the Code. The sub-section does not prescribe two separate procedures......In our opinion the proviso does not enact a different and alternative mode of recovery of the certified amount of tax but only confers additional powers on the Collector for the better mode of effective application of the only mode of recovery authorised by the body of sub-section (2) of section 46. If that be the position, the Collector would not be competent to take any independent proceedings under the Code of Civil Procedure, that is independent of the powers to recover an arrear of land revenue ".

In *Dhanalakshmi Ammal* v. *Income-tax Officer*[2], the learned Chief Justice pointed out :

" But for the additional powers conferred on the Collector by the above mentioned proviso we are of opinion that the Income-tax Act did not provide for the recovery of arrears due from the assessee from persons in possession of property which they do not admit to be the assesse's property ".

The question now is whether the orders passed by the Collector, to avoid which the suits were filed, were orders passed by a Civil or Revenue Court within the meaning of section 41 (1) of the Madras Court-Fees and Suits Valuation Act, 1955.

The expressions " Civil Court " and " Revenue Court " themselves have not been defined by the Act. But section 3 (ii) defines Court :

" Court means any Civil, Revenue or Criminal Court and includes a Tribunal or other authority having jurisdiction under any special or local law to decide questions affecting the rights of parties ;"

Thus at least four classes are included within the definition of Court for the purposes of the Madras Court-Fees and Suits Valuation Act : (1) Civil Courts, (2)

1. (1955) 28 I.T.R. 891 at 896.
2. (1957) 2 M.L.J. 567 : (1957) 31 I.T.R. 460 at 464.

Revenue Courts, (3) Criminal Courts, and (4) any Tribunal or authority having jurisdiction under any special or local law to decide questions affecting the rights of parties.

The Collector in this case was authorised by section 46 (2) to recover the arrears of income-tax due from the assessees as arrears of land revenue. Obviously in realising the arrears of land revenue the Collector does not constitute either a Civil or a Revenue Court. There can be no question, of course, of his constituting a Criminal Court. No doubt, under the proviso to section 46 (2), the Collector can exercise additional powers, but still these powers are exercised only to realise the arrears of income-tax as arrears of land revenue. It was in exercise of those powers that the Collector had to decide whether the claims were well founded, that is, whether the properties were not liable to attachment. In assuming and exercising that jurisdiction he exercised the powers of a Civil Court under the proviso to section 46 (2). That made the Collector only a " Tribunal or other authority having jurisdiction under any special or local law to decide questions affecting the rights of parties ". The proviso to section 46 (2) did not itself constitute the Collector a Civil Court within the meaning of section 3 (2) of the Madras Court-Fees and Suits Valuation Act.

It should be remembered that section 41 (1) is applicable not to all orders passed by any Court but only to orders passed by a Civil or a Revenue Court. It was not the case of any one that the Collector constituted a Revenue Court in these proceedings. He did not constitute a Civil Court either, though under the proviso to section 46 (2) of the Income-tax Act he exercised the powers of a Civil Court.

Even in the Income-tax Act itself the powers of a Civil Court have been conferred on other authorities, officers of the Income-tax Department itself But it should be taken as well-settled that, merely because they exercise those powers in the course of assessment proceedings or appeals arising therefrom, they do not constitute Civil Courts. A Tribunal exercising the powers of a Civil Court under the Civil Procedure Code for certain limited purposes is not constituted a Civil Court by the mere provision for the exercise of those powers ; and there is nothing more than the p oviso to section 46 (2) of the Income-tax Act in this case to furnish any basis for holding that the Collector, while exercising the powers of a Civil Court, himself constituted a Civil Court within the meaning of section 3 (ii) and section 41 (1) of the Madras Court-Fees and Suits Valuation Act.

The question at issue in these proceedings has to be answered primarily with reference to the definition of " Court " in section 3 (ii) of the Madras Court-Fees and Suits Valuation Act, 1955. I have held that the Collector would be a Court within the meaning of section 3 (ii), but that he would not be a Civil Court within the meaning of section 3 (ii) or section 41 (1) of the Act. It is therefore really unnecessary to consider in detail the decisions cited during the arguments before me whether various statutory authorities could or could not be viewed as Civil Courts for other purposes. The question that arose for decision in *Bharat Bank* v. *Employees, Bharat Bank*[1], was whether the Industrial Tribunal was a Court. The principle laid down therein was followed by the Supreme Court in *Durga Sankar* v. *Raguraj Singh*[2]. In *Mahabaleswarappa* v. *Gopalaswami Mudaliar*[3], an Election Commissioner was held to constitute a Court and a Civil Court within the meaning of sections 476 and 195, Criminal Procedure Code. In *Raja of Venkatagiri* v. *Sheik Mahaboob*[4], Revenue Courts established under the Madras Estate Land Act were held to be Civil Courts for purposes of section 115, Civil Procedure Code. In *Sriram Rao* v. *Suryanarayanamurthy*[5], it was held that for the purpose of the Madras Debt Conciliation Act, the Registrar of Co-operative Societies functioning under the Madras Co-operative Societies Act was a Civil Court, though the provisions of the Code of

1. (1950) S.C.R. 459 : A.I.R. 1950 S.C. 188.
2. (1954) 2 M.L.J. 385 : (1954) S.C.J. 723 : (1955) 1 S.C.R. 267.
3. (1935) 69 M.L.J. 589 : I.L.R. 58 Mad. 954.
4. (1943) 2 M.L.J. 615 : I.L.R. (1944) Mad. 595.
5. (1953) 1 M.L.J. 542.

Civil Procedure themselves did not apply to the proceedings before him. In this connection I may point out that independent of this decision, the *Explanation* to section 41 specifically provides : " For purposes of this section a Registrar of Co-operative Societies shall be deemed to be a Civil Court ". As I said none of these decisions can really help in determining the question at issue, which has to be decided with reference to the requirements of section 41 (1) read with section 3 (ii) of the Madras Court-Fees and Suits Valuation Act, and also with reference to section 46 (2) and the proviso thereto of the Income-tax Act.

I uphold the contention of the learned counsel for the petitioner, that the suits filed by the plaintiff did not fall within the scope of section 41 (1) of the Act, because the suits were not to avoid orders passed by a Civil Court, though they were suits to avoid orders passed by a Court within the meaning of section 3 (ii) of the Madras Court-Fees and Suits Valuation Act. The plaints were properly stamped under the residuary section, section 50 of that Act.

These petitions are allowed. The orders of the learned Subordinate Judge are set aside. There will however be no order as to costs. The petitioner will be entitled to a refund of the excess Court-fee that has been collected.

R.M. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Volkart Brothers, Madras .. *Petitioner**

v.

The State of Madras, represented by the Commercial Tax Officer, Esplanade Division, Madras .. *Respondent.*

Constitution of India (1950), *Article* 286 (1) (*a*), Explanation—*Applicability and scope—Sales of goods by dealers in Madras to buyers outside the State—Taxability in Madras—Sales Tax Continuance Order* (1950)—*Scope and effect of.*

A sale which falls within the scope of the *Explanation* to Article 286 (1) (*a*) of the Constitution can itself be a sale in the course of inter-State trade and to such a sale the ban imposed by Article 286 would also apply. If that ban is lifted, the question which has to be considered is which is the State that could tax the transaction, in view of the fact that the ban on transactions in the course of inter-State trade was lifted by the Sales Tax Continuance Order, 1950, upto 31st March, 1951.

In the case of outside sales, the Sales Tax Continuance Order would not enable the State from which the seller sold the goods to buyers outside the State for consumption in that State, to tax the transactions because the implied ban imposed by the *Explanation* to Article 286 (1) (*a*) would apply *proprio vigore* and would not be covered by the President's Sales Tax Continuance Order, which was concerned only with the lifting of the ban on taxing of sales in the course of inter-State trade.

Ram Narain v. *Assistant Commissioner of Sales-tax,* (1955) 6 S.T.C. 627, followed.

It cannot be said that irrespective of whether the sales come within the scope of Article 286 (1) (*a*) or whether they were sales in the course of inter-State trade or commerce within the scope of Article 286 (2), the levy would be subject to sales-tax under the Sales Tax Continuance Order.

State of Travancore-Cochin v. *S. V. C. Factory,* (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 : 1954 S.C.R. 53 : (1953) 4 S.T.C. 205, *East India Match Factory* v. *The State of Madras,* (1954) 2 M.L.J. 585 : 5 S.T.C. 269 and *Bengal Immunity Co., Ltd.* v. *State of Bihar,* (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : 4 S.T.C. 446, referred to.

Petition under section 12-B of Act IX of 1939, praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 21st September, 1955, in T.A. No. 18 of 1955, preferred against the Order of the Special Commercial Tax Officer for Appeal, Madras City, dated 23rd October, 1954, in Appeal No. N.M. 98 of 1952-53 (A-3. 952/1950-51 on the file of the Deputy Commercial Tax Officer, Esplanade, Madras).

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* T.R.C. No. 63 of 1956. 14th September, 1959. (24th Bhadra, 1881—Saka).

Srikrishna instructed by *Messrs. King and Partridge*, Attorneys, for the Petitioner.

The Government Pleader (*K. Veeraswami*), on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—These proceedings related to the assessment year 1950-51, when the President's Sales Tax Continuance Order, 1950, was in force. The only item of the assessee's turnover, with which we need concern ourselves, at this stage, is what was dealt with as the "second item" by the Tribunal, sales of machinery, etc., to buyers outside the State, the turnover of which was Rs. 3,02,639-3-0. The contention of the assessee was that these were sales which fell within the scope of *Explanation* to Article 286 (1) (*a*) of the Constitution, and that, as the machinery in question had been sold in the course of inter-State trade to persons residing outside the State for consumption in those States, those sales could not be taxed within the State of Madras, nor could they be treated as intra-State sales, as far as Madras State was concerned. Even in the proceedings before the Tribunal, the assessee produced certain affidavits, which no doubt covered only a portion of the disputed turnover, in support of his contention, that the machinery had been sold to buyers in the States outside Madras State for the purpose of consumption in those States, that is, the buyers' States.

The Tribunal considered the question, whether these were "Explanation sales" in the sense that they came within the scope of *Explanation* to Article 286 (1) (*a*). If they fell within that category, then, obviously, Madras State could not tax those transactions, as those would be outside sales as far as Madras State was concerned, and they would be inside or *intra-State* sales only in States where the goods were delivered for consumption. The Tribunal, apparently, was of the view, that it was unnecessary to decide the question, because whether the sales come within the scope of Article 286 (1) (*a*) or whether they were sales, in the course of inter-State trade or commerce within the scope of Article 286 (2), the levy would be subject to sales-tax under the President's Sales Tax Continuance Order. That view itself was based upon certain observations of the learned Judges of the Supreme Court in *State of Travancore-Cochin* v. *S. V. C. Factory*[1], and also the observations of this Court in *East India Match Factory* v. *The State of Madras*[2], to which the Tribunal referred. We have, however, to re-consider the position in the light of the principles laid down in the *Bengal Immunity Co., Ltd.* v. *State of Bihar*[3], and *Ram Narain* v. *Assistant Commissioner of Sales Tax*[4].

The "Explanation sale", that is, the sale which falls within the scope of Article 286 (1) (*a*) of the Constitution can itself be a sale in the course of *inter-State* trade, and to such a sale the ban imposed under Article 286 (2), as it stood, would also apply. If that ban is lifted, then the question would arise, under the *Explanation* to Article 286 (1) (*a*), which is the State that could tax the transaction, in view of the fact, that the ban on the transaction in the course of inter-State trade was lifted by the President's Sales Tax Continuance Order up to 31st March, 1951. Then as we said, we have to decide whether it was an inside sale as far as Madras State was concerned, or whether it was an outside sale which came within the scope of *Explanation* to Article 286 (1) (*a*). If they were outside sales, the President's Sales Tax Continuance Order would not enable Madras State to tax those transactions, because the implied ban imposed by *Explanation* to Article 286 (1) (*a*) would apply *proprio vigore* and could not be covered by the President's Sales Tax Continuance Order, which was concerned only with the lifting of the ban of taxing of sales in the course of inter-State trade. That was the principles explained in the subsequent decision of the Supreme Court in *Ram Narain* v. *Assistant Commissioner of Sales Tax*[4].

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1. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 : 1954 S.C.R. 53 : (1953) 4 S.T.C. 205.
2. (1954) 2 M.L.J. 585 : 5 S.T.C. 269.
3. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : 4 S.T.C. 446.
4. (1955) 2 M.L.J. (S.C.) 302 : (1955) S.C.J. 808 : 6 S.T.C. 627.

Since the question at issue, whether these were sales or machinery outside the State of Madras for consumption in the States of delivery, was not decided by the Tribunal, we think that the best course would be to remand the proceedings for disposal afresh, the remand being limited to the issue we have mentioned above, the liability of the " second item " with the turnover of Rs. 3,02,639-3-0 to s les-tax. It is open to the Tribunal to allow the assessee an opportunity to supplement the evidence already on record. Even if such further evidence is not offered, then with reference to the facts already on record the Tribunal will consider whether even a portion of the turnover is of sales of articles delivered for consumption outside the State of Madras, and if so, whether Madras State could not tax such sales, despite the President's Sales Tax Continuance Order. In other respects, the order of the Tribunal will stand confirmed. In fact, those findings were not challenged before us.

The order of the Tribunal is set aside to the extent indicated above. The Tribunal will hear the appeal afresh on the lines indicated above and dispose of it in accordance with law. There will be no order as to costs in the proceedings before us.

P.R.N. ——— *Order set aside in part and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Vazir Begum Ammal and another .. *Appellants**

v.

Seth Tholaram .. *Respondent.*

Evidence Act (I of 1872), section 6—Exception as to exclusion of hearsay evidence—Suit on a promissory note—Proof of signature of a Pardhanashin lady—Husband's statement that the signature on the note is his wife's—If admissible in evidence.

In a suit on a promissory note executed by a Pardanashin lady where it is established by evidence that the promissory note was taken by the husband of the lady inside the house and was brought back after obtaining the signature and the husband stated that the signature on the note was his wife's the statement so made is admissible in evidence to prove the signature of the lady on the promissory note.

Appeal against the Decree of the Court of the Subordinate Judge, Tiruchirapalli, in Original Suit No. 32 of 1955.

P. S. Srisailam, for Appellants.

T. S. Raghavachari, S. Amudachari and *A. V. Raghavan,* for Respondent.

The Court delivered the following

JUDGMENT.—The point for determination in this appeal is whether the promissory note, Exhibit A-1, was executed by defendants 1 and 2, and, if it was, whether it is not supported by consideration. The learned Subordinate Judge found that the promissory note was executed by defendants 1 and 2 and that it was supported by consideration. The defendants appeal from that judgment.

The promissory note purports to have been executed by defendants 1 and 2 in favour of the plaintiff. The second defendant is the wife of defendant 1. The promissory note is in a printed form. The evidence of P.Ws. regarding the execution of the promissory note is this. Defendant 1 filled up the blanks in the printed form. The printed form as filled up by defendant 1 was the promissory note for Rs. 6,200 payable with interest at 12 per cent. per annum for value received in cash. It contains the words, " We promise ". The agreement between defendant 1 and P.W. 1 was that the promissory note should be executed by both the defendants. P.Ws. 1 and 2 and defendant 1 were sitting in the payal of the house of the defendants. Defendant 1

* Appeal No. 147 of 1956. 15th September, 1959. (24th Bhadra, 1881—Saka.)

after having filled up the blanks in the form, took the promissory note inside, saying that he would obtain his wife's signature. She is a purdhanashin lady whom the plaintiff should not see. Defendant 1 came out with her thumb-impression and her signature in Urdu. He told the P.Ws. that the thumb-impression and signature had been affixed by his wife. He made an endorsement to that effect in the left-hand margin of the promissory note and signed that endorsement. After signing that endorsement, he affixed his own signature to the promissory note below the signature and thumb-impression which, he said, were his wife's. P.W. 1 accepted the promissory note from defendant 1.

Defendant 1 denied that his wife had affixed her thumb-impression or made her signature. His evidence is this : P.W. 1 was not present at the time of the execution of the promissory note by defendant 1. P.W. 2 took the promissory note to defendant 1. P.W. 2 wanted that the promissory note should be executed by both the defendants. The first defendant told P.W. 2 that defendant 2 woud not agree to execute the promissory note ; but P.W. 2 said that defendant 1 might make an endorsement on the margin that the thumb-impression and the signature were those of his wife and sign the endorsement and also the promissory note and that P.W. 2 himself would obtain the second defendant's thumb-impression and signature. On the statement being made by P.W. 2 defendant 1 wrote the endorsement which appears in the margin and affixed his signature to the endorsement and to the promissory note.

It is plain that the evidence of defendant 1 is false. Neither P.W. 1 nor P.W. 2 was interested in taking the promissory note as if executed by defendant 2 if she was not willing to execute it. Defendant 1 himself would not have left the promissory note in the hands of P.W. 2 or P.W. 1, knowing that they would make an attempt to forge a signature or have a thumb-impression affixed as the signature or thumb-impression of his wife. I agree with the learned Subordinate Judge in his appreciation of the evidence on this point. I find that the evidence of the P. Ws. is true and that the facts in relation to the execution of the promissory note are that defendant 1 promised that the promissory note would be executed by him and his wife, that he wrote out the promissory note, filling up the blanks in the printed form, and took the promissory note inside his house for his wife to sign it, that he brought the promissory note out with a thumb-impression and signature in Urdu, that he told P.Ws. 1 and 2 that the thumb-impression and signature were his wife's and made an endorsement to that effect in the promissory note, and that, thereafter, he himself put his signature to the promissory note below the thumb-impression and signature which were represented by him to be his wife's. Defendant 1's signature to the promissory note is admitted by him. The question is whether the execution of the promissory not by defendant 2 has been proved.

There is no direct evidence that defendant 2 affixed her thumb-impression or that she signed the promissory note. If the evidence of the P.Ws. that defendant 1 told them that the thumb-impression and the signature appearing in the promissory note were his wife's is not admissible on the ground that it is hearsay then, there is very little evidence in support of the learned Subordinate Judge's finding that the second defendant executed the promissory note. I have given reasons for the view that I believe the P.Ws. when they say that defendant 1 told them before he himself signed the promissory note that the signature and thumb-impression appearing in the promissory note above his signature had been made by his wife. The question is whether defendant 1's statement that the signature and thumb-impression in the promissory note had been made by his wife gets excluded under the rule of exclusion of hearsay evidence.

The rule of exclusion of hearsay evidence has an exception enacted in section 6 of the Evidence Act. Section 6 states :—

" Facts, which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place, or at different times and places."

Illustration (*a*) to that section is this :—

" *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact."

In the present case, the fact in issue is whether defendant 2 executed the promissory note. The facts which are proved are that defendant 1 went inside the house with the promissory note drawn up, but unsigned, and came out with the document bearing a thumb-impression and signature and said that the thumb-impression and signature had been affixed by his wife. He made an endorsement to that effct on the promissory note. The fact in issue, namely, whether she signed the promissory note inside the house is so connected with the acts of defendant 1 getting inside the house, coming outside the house to the verandah with the thumb-impression and signature and then stating that the thumb-impression and signature were his wife's as to render all of them parts of the same transaction. Under the rule of *res gestae* enacted in section 6 of the Evidence Act, statements which form part of the same transaction become an exception to the rule of exclusion of hearsay evidence. The statement made by defendant 1 that the thumb-impression and the signature in Urdu appearing in Exhibit A-1 were his wife's is admissible in evidence. Since that statement is admissible in evidence, it forms circumstantial evidence tending to prove that defendant 2 executed the promissory note.

The next question is whether defendant 1's statement made to P.Ws. 1 and 2 that his wife had made the thumb-impression and signature should be accepted. When defendant 1 brought the promissory note outisde, he clearly knew who had made the signature and affixed the thumb-impression. He does not say that any other person made the signature and affixed the thumb-impression. The circumstantial evidence thus proves beyond reasonable doubt that the signature and thumb-impression appearing in Exhibit A-1 are the signature and thumb-impression of defandant 1, that is, that she executed the document.

In support of his conclusion that the signature appearing in Exhibit A-1 is that of defendant 2, the learned Subordinate Judge relied on his own opinion formed as a result of comparing that signature with the signature appearing in Exhibit A-6, which is admitted to be hers. On the question whether the opinion formed by a Judge regarding the execution of a document by a person, merely on a comparison of the signatures appearing in the document, which is said to be his, with other signatures which are admitted to be his, is by itself evidence adequate for resting a finding, the view taken by this Court in *Pasupuleti Venkamma* v. *Shaik Hamid*[1] and *Narasimha Rao* v. *Someswar Joshi*[2] is not in accord with the observations made by a Bench of the Calcutta High Court in *Fazaladdin* v. *Panchanan Das*[3]. The point relates to the use that can be made of the opinion formed by a Judge on a comparison of signatures made under section 73 of the Evidence Act. Where a document is alleged by one party to bear the signature of a person, say, *X*, and *X* denies that the document was signed by him, then, the opinion of an expert on the question whether the disputed signature is that of *X*, given on a comparison of that signature with signatures of *X*, which are admitted or proved, is a relevant fact under section 45 of the Evidence Act. Similarly the opinion of persons who are acquainted with *X's* signature, given after a comparison of the disputed signature with admitted or proved signatures, is relevant under section 47. In these sections, the Legislature expressly states that the opinions are themselves relevant facts. Under section 73, the Court is authorised to compare the disputed signature with signatures which are admitted or proved in order to ascertain whether the disputed signature was made by the person, by whom it is alleged to have been made. Where the Court has before it opinions which are declared relevant facts under section 45 or section 47 of the Evidence Act, the Court may base its conclusion in a proper case solely on such opinions and decide on the basis of these opinions whether the disputed signature was made by the person by whom it purports to have been made. But, where the Court bases its conclusion

1. (1912) 14 I.C. 741.
2. (1956) 2 M.L.J. 399.
3. A.I.R. 1957 Cal. 92.

solely on its own opinion arrived at as a result of comparison of the disputed signature with admitted or proved signatures, the decisions of this Court in the cases referred to above,—in each case, by a Judge sitting singly—are to the effect that the Court's judgment cannot be called in question on the ground that it is not based on evidence. The observations made by the Calcutta High Court on that point are these :—

> "It is true, if there was no evidence before the Court as regards the genuineness of the signature, the Court could not, in law, rely on its own examination of the signature to supply the evidence because the learned Judge could not treat himself as an expert. I am unable to find anything in principle or authority which bars the Judge of facts from using his own eyes and looking at the admitted signature along with the disputed signature in deciding whether the evidence that has been given as regards the genuineness of the document should be believed or not."

If those observations correctly state the law on that point it would follow that, where there is no evidence on the question of the genuineness of the disputed signature in the shape either of direct or circumstantial evidence or of opinions relevant under section 45 or section 47, the Court's own opinion arrived at as a result of comparison of signature authorised by section 73 of the Evidence Act would not be adequate for resting a finding on. If there were not in this case circumstantial evidence proving that the second defendant's signature and thumb-impression described in the promissory note as hers were in fact made by her, it might have been necessary to refer to a Bench for authoritative decision the question whether, in a case where there is no other evidence, direct or circumstantial, and no opinion relevant under section 45 or section 47 regarding the genuineness of a disputed signature, the Court's own opinion on a comparison of signatures made under section 73 of the Evidence Act would be adequate for resting a finding on the genuineness of the disputed signature. In this case, we have circumstantial evidence, which, as I have said, is adequate to prove that the second defendant executed the promissory note. The conclusion based on that evidence gets reinforced by the opinion formed on a comparison of signatures under section 73 of the Evidence Act. As to the result of comparison of the signatures, I agree with the learned Subordinate Judge in his opinion that the signature in Exhibit A-1 appears to be the signature of the person who made the admitted signature in Exhibit A-6, namely, defendant 2.

I agree with the learned Subordinate Judge and find that the promissory note was executed by defendant 2 as well as by defendant 1.

The next question is whether the promissory note is not supported by consideration. On that question, the P.Ws. state that the plaintiff paid Rs. 5,200 to defendant 1. The need for the money and the purpose to which he put the money is proved by the evidence, which has been discussed in detail by the learned Subordinate Judge. It is unnecessary that I repeat what he has said. I accept the evidence of the P.Ws. and find that the suit promissory note was supported by consideration.

The appeal is dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE RAMASWAMI.

In the matter of the Indian Companies Act (VII of 1913).

and

In the matter of Free Press Journals (Madras), Ltd. (In liquidation).

Indian Commerce and Industries Co., Ltd., by its Managing Director C. Audikesavalu Chettiar .. *Petitioners**

v.

Free Press Journals (Madras) Limited .. *Respondent.*

The Official Liquidator, Madras High Court, the Official Liquidator of the company abovenamed .. *Applicant.*

Companies Act (I of 1956), *section* 467, *Proviso—Settlement of the list of contributories—Dispensing with.*

In the liquidation practically all the assets have been realised and a dividend has been declared. The company is a private limited company and the management changed hands in 1953 by the previous directors transferring their shares which were fully paid up to the new set of directors. From the realisations there will be no surplus left after payment to the creditors for a return of the capital to the contributories as only a dividend of 4 nP. in the rupee had been declared to the creditors and the further assets that could be realised will not yield one more naya paise in the rupee. Under the proviso to section 467 the Court may dispense with the settlement of the list of contributories.

The Official Liquidator (*N. Arunachalam*) in person.

The Court delivered the following

JUDGMENT.—This is an application by the Official Liquidator in the matter of the liquidation of the Free Press Journals (Madras) Limited.

The Official Liquidator prays (*a*) that under the proviso to section 467 of the Indian Companies Act, 1956, this Court may dispense with the settlement of the list of contributories in this liquidation ; and (*b*) that except the statutory books, the order books, records and files of the company be permitted to be disposed of and the proceeds credited to the company.

Section 467 of the Companies Act is one of the most important sections of the said Act. This section corresponds to section 184 of the previous Act and section 257 of the English Act of 1948. As recommended by the Company Law Committee at page 317 of their report, the proviso to section 257 (1) of the English Act has been embodied in this section. This section deals with the list of contributories. A contributory has been defined in section 428 of the Act, which corresponds to section 168 of the old Act and section 213 of the English Act. The English section makes it clear that the term includes all the persons who have fully paid their share amounts and embodies the effect of the decisions in the matter. This section provides that after the list is prepared by the Liquidator it has to be settled by the Court.

The words "as soon as" used in section 467 show that the list should be prepared and settled speedily. The necessity and importance of taking this step speedily was pointed out by Chitty, J., in In re *English Bank of the River Plate*[1], in the following words :—

" The importance of settling the list of contributories is well known because no call can be made till after it is settled ; and there is a tendency for the assets of a company which remain to be called up from the contributories to disappear where there is delay in settling the list and making the calls ".

It is only on the list of contributories being settled that the amount realisable from them can be ascertained.

In settling the list of contributories it is the duty of the Court to go into all questions of law and facts which may be raised in order to ascertain the question of liability. Liability means the liability existing at the time of making the order.

* Application No. 1456 of 1959 in O.P. No. 129 of 1955. 11th September, 1959. (20th Bhadra 1881—Saka).

1. L.R. (1892) 1 Ch. 391 at 394, 395.

The effect of the settlement of the list of contributories and the placing of the name of a person in the said list is unless the order is set aside on appeal, to render the question of liability final and conclusive. The matter is *res judicata*. The liability of a member to be included in the list of contributories is *ex-legis* and not *ex contractum*. So if he fails to object in time he will be liable as contributor and estopped from denying the same.

In settling the list of contributories the Court is not bound by the register of shareholders, and has authority to rectify the register, and may go into all questions of law and fact in order to determine the question as to who is the real owner of the shares. The power to rectify the register is not limited to the time when the Court is settling the list of contributories. The Court may revise the list of contributories at any time before the dissolution of the Company, and, if necessary, for that purpose, rectify the register. There is nothing in the Act which prevents the Court even after the list of contributories is settled to resettle it. The Court is competent to alter the list at any time whenever it finds it just that it should be so altered.

The exercise of the jurisdiction given by the section is, however, discretionary; The Court must be set in motion by the party who wants to contest the liability or by the Liquidator, as the case may be, and it is not for the Court to act *ex mero motu suo*.

These principles are embodied in Re *Westways Georges Limited*[1], *Sichall's case*[2], Re *Sussex Brick Co.*[3], In re *Nathan*[4], *Ganesh Singh* v. *Sankar Lal*[5], *Waryam Singh* v. *Official Liquidator*[6], In re *Indian Specie Bank Ltd.*[7], In re *Peninsular Life Insurance Co., Ltd.*[8], *Bank of Hindustan* v. *Kowtha Suryanarayana Rao*[9], *Amarnath*, In re[10], *Lakshmi Narasa Reddi v. Sri Films*[12]; In re *East India Cotton Mills*[13].

These principles can be gathered from the analysis in the standard text-books : Buckley on The Companies Acts, 13th Edn., (Butterworth) 1957, page 534. Magnus and Estrin Companies, Law and Practice, 3rd Edn., page 254 ; Sir N. N. Sircar, K.C.S.I. and Sushil C. Sen, The Indian Companies Act (1937), page 594, Sri T. R. Srinivasa Iyengar, Companies Winding-up (1959) (Company Law Series No. 4) (Law Book Co., Allahabad), page 103 and following.

Therefore, whenever an application is made by the Official Liquidator for exercising the powers contained in the proviso to section 467, it must be scrutinised with great care as the consequences are very large.

Bearing these principles in mind, if we examine the facts of this case, we find that the Official Liquidator has made out a case. In this liquidation practically all the assets consisting of printing plant and machinery and outstandings have been realised and a dividend has been declared. There are a few small outstanding debts which are being realised. The company is a private limited company and the management changed hands in or about May, 1953, by the previous directors transferring their shares which were fully paid up to the new set of directors consisting of only three persons. Subsequently the company was working for only a few months during which further shares had been allotted according to the minute book, but no regular procedure seems to have been adopted. The result was that certain persons who had lent moneys are allotted shares without their consent and they ultimately denied that they were contributories and had to be admitted as creditors for the moneys paid by them. The books of the company have not been kept properly. It has not been possible to rely upon the books of the company which are incomplete or on the returns sent to the Registrar for settling a correct list of contributories. Moreover, from the realisations there will be no surplus left after payment to the creditors for a return of the

1. (1942) 2 All E.R. 147.
2. (1867) L.R. 3 Ch. App. 1942.
3. L.R. (1904) 1 Ch. 598.
4. L.R. 35 Ch. D. 1.
5. 28 T.C. 142.
6. A.I.R. 1926 Lah. 414.
7. (1915) I.L.R. 40 Bom. 134 at 138.
8. A.I.R. 1936 Bom. 24 at 26
9. (1957) 2 M.L.J. 517 : I.L.R. (1957) Mad. 1058: 70 L.W. 715.
10. A.I.R. 1952 Punj. 411.
12. (1951) 1 M.L.J. 488 : I.L.R. (1952) Mad. 108.
13. A.I.R. 1948 Cal. 69.

capital to the contributories, as only a dividend of 4 nP. in the rupee had been declared to the creditors and the further assets which could be realised will not yield even one more naya paisa in the rupee. Therefore prayer (*a*) is granted.

Prayer (*b*).—In the circumstances excepting the statutory books, the rest of the useless books, records, and files which are large in volume and cluttering in appreciable portion of the limited record room of the Official Liquidator and whose preservation serves no useful purpose, are directed to be sold and the proceeds credited to the company.

The cost of this application will come out of the estate.

V.S. ——— *Prayers granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Janakiammal (deceased) by L. R. Ramaswami Gounder (died) by widow Rajammal .. *Petitioner**

v.

A. T. Krishnaswami Mudaliar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 145 and Schedule—Appendix G, Form 3—Security Bond—Enforcibility by execution.

A security bond executed in favour of an officer of Court in the form mentioned in Form 3 of Appendix G of the Schedule to the Code of Civil Procedure is not executed in favour of a particular person either by designation or by name and is not as such assignable. Even if such a case does not come within section 145 of the Code the Court has ample jurisdiction in its inherent powers to enforce such a bond by way of execution in the same proceedings to realise the money. There is no necessity to bring a separate suit to enforce the bond.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Coimbatore, dated 7th October, 1958 and made in E.P. No. 134 of 1957 in O.S. No. 226 of 1946.

Vedantham Srinivasan, for Petitioner.

K. S. Champakesa Ayyangar and *K. C. Srinivasan,* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is preferred by the seventh respondent in E.P. No. 134 of 1957 in O.S. No. 226 of 1946 on the file of the Second Additional Subordinate Judge, Coimbatore. That petition was filed by the defendants in O.S. No. 226 of 1946 under the following circumstances. O.S. No. 226 of 1946 was laid against two defendants by the two persons for recovery of a sum of more than one lakh of rupees. They got a decree in the first Court not for the full sum claimed, but, for a part of it. Against that decree, an appeal was preferred to this Court, being A.S. No. 713 of 1947. That appeal was preferred by the judgment-debtors—defendants objecting to the decree passed by the Subordinate Judge of Coimbatore. The plaintiffs in the lower Court also preferred an appeal to this Court objecting to the disallowance of a portion of the plaint claim. Pending the appeal, an order for stay was obtained in this Court on condition that the amount of the decree should be deposited in the trial Court, and the decree-holders should take it out on giving security. The decree amount was accordingly deposited in the trial Court, and security was given in the shape of a bond by two persons, husband and wife, one of whose legal representatives is the present petitioner. That bond was in Form No. 3, Appendix G, First Schedule to the Code of Civil Procedure.

The appeal to the High Court preferred by the defendants succeeded, while the other appeal failed with the result, the decree-holders, who had withdrawn the amount deposited in the first Court, had to re-deposit the amount with interest

*Civil Revision Petition No. 421 of 1959. 5th September, 1959. (14th Bhadra 1881—Saka).

They failed to do so. An execution petition by way of restitution was filed by the defendants, and arrest of one of the plaintiffs was prayed for. He was not available, and the execution petition was dismissed.

Subsequently, the present execution application was filed for bringing to sale the properties hypothecated under the security bond given to Court. Two objections were raised to execution. The first was that the bond did not contain personal liability, and could not be enforced under section 145 or 151 of the Code of Civil Procedure. The second objection was that without exhausting the remedies open against the principals the security bond could not be enforced. Both the objections were overruled by the Subordinate Judge and execution was ordered. That order is questioned in this revision petition.

The learned counsel for the petitioner raised two points. The first is that the bond is assignable, and the Subordinate Judge should have assigned the bond to the decree-holder herein and should not have allowed the execution to proceed by bringing the hypothecated properties to sale in this proceeding. For contending that the bond is assignable, he referred to the decision of Justice Cornish in *Pulayarti Satyam* v. *Kunchibhetla Satyanarayana and another*[1]. That was a case where the bond was given under Order 32, rule 6. It was addressed to the Additional District Munsif, though the name of the officer was not given. The learned Judge held that the bond was assignable, though it was not executed to the officer by name. The facts here are entirely different. The form of the bond which follows Form No. 3, Appendix G, First Schedule to the Code of Civil Procedure, does not mention whether it is executed in favour of any particular officer or Court. The learned counsel brought to my notice the decision of the Privy Council in *Raj Raghubar Singh and another* v. *Thakkur Jai Indra Bahadur Singh*[2], where Their Lordships of the Privy Council had occasion to note this form. I am not sure whether the form referred to in the Judgment of the Privy Council is identical with the form which we have now in Form No. 3, Appendix G, First Schedule to the Code of Civil Procedure. Whatever it is, from the mere fact that at the top of the bond we find the words, "to the Subordinate Judge, Coimbatore" it cannot be said that the bond was executed in favour of a person. The recitals in the bond amply make it clear that no question of the bond being addressed to any person arises. The recitals show the liability undertaken by the obligor, and how that liability should be discharged. I do not, therefore, agree that the bond in this case is addressed to a particular person either by designation or by name. It follows this bond was not assignable, and as was laid down by the Privy Council in *Rohani Ramandhwa* v. *Har Prasad Singh*[3], in such a case the party should not be left without a remedy. Even if section 145, Civil Procedure Code, will not apply, the Court has ample jurisdiction in its inherent power to enforce the bond by way of execution in the same proceedings to realise the money.

The next point raised by the learned counsel is that this bond does not provide for any personal liability. On a reading of the bond, I find provision is made in it for payment of the balance that would remain due after the sale of the hypothecated properties, by the obligor. That certainly is an obligation undertaken personally by the persons who have the bond. The fact that in certain contingencies that liability may not be enforced, is beside the point. The short question is whether the bond provides for personal liability. The answer must be 'yes' because if the hypotheca is found to be insufficient personal liability to pay the balance is written into the security bond. That would be sufficient to bring the bond within the ambit of section 145 of the Code of Civil Procedure. The learned Judge in the Court below was therefore right in enforcing this bond by bringing to sale the hypothecated properties in proceedings in execution without driving the parties to a separate suit. The revision petition is dismissed with costs.

R.M. *Petition dismissed.*

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1. (1936) 71 M.L.J. 675.
2. (1920) 38 M.L.J. 302: L.R. 46 I.A. 228 I.L.R. 42 All. 158.
3. (1943) 2 M.L.J. 460 : A.I.R. 1943 P.C. 189.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAMANYAM.

Thanga Mayil Ammal .. *Appellant**

v.

Pappa *alias* Fathima Bibi and another .. *Respondents.*

Muhammadan Law—Wakf—Instrument providing for maintenance of founder's daughter and her descendants and also for charity—Whether a valid wakf—Musalman Wakf Validating Act (VI of 1913), *section* 3—*Reservation to the charity in case of failure of descendants—Reservation can be implied.*

Where the main purpose of the instrument was to provide for maintenance and support of the founder's daughter and her descendants and it was a concurrent purpose that a small sum should be spent on the charity specified in the instrument, namely, the performance of the fatia and the feeding of fakirs on the Prophet's birth day, the deed takes effect as a wakf deed.

Under section 3 of the Musalman Wakf Validating Act the reservation in favour of the religious object, namely, the performance of fatia, and feeding of fakirs on the Prophet's birth day on the failure of the line of the first muttavalli and her descendants may be implied and the wakf is valid under the Muhammadan Law.

Where the founder had transferred patta in the name of the charity, and where the charities were being performed, it must be held that the founder had intended to extinguish his own title and make the charity the owner of the property.

Syed Ahmed v. *Julaitha Bivi,* (1946) 2 M.L.J. 335, referred.

Appeal against the Decree of the Court of the Subordinate Judge of Tiruchirapalli in Appeal Suit No. 58 of 1956, preferred against the Decree of the Court of the District Munsif of Tiruchirapalli in Original Suit No. 237 of 1954.

A. V. Narayanaswami Ayyar, for Appellant.

V. Natesan, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit instituted in the Court of the District Munsif of Tiruchirapalli, for possession of certain properties alleged by the plaintiff to be wakf properties. The District Munsif granted a decree as prayed for. The second defendant's appeal to the Subordinate Judge, Tiruchirapalli, was dismissed. The third defendant to whom the second defendant has transferred the property is the appellant in this second appeal.

The property belonged to one Hyder Masthan Sahib. He executed a wakf deed dedicating the property for the use of the Prophet on 12th October, 1946. In the document Hyder Masthan said that the property was till then his and would thereafter be the Prophet's. Hyder Masthan declared that he would be the Muttavalli during his lifetime and after his death, the plaintiff, his daughter by his deceased first wife, would be the Muttavalli; and that after her death, the Muttavallis would be her descendants. There was also a direction in the document that, out of the income from the property, fatia should be preformed in the name of the Prophet and that eleven fakirs should be fed on His birthday, that Rs. 5 should be spent for the purpose ; that kist should be paid ; that the balance of the income should be taken by his daughter and her descendants from generation to generation and that they would have no right to alienate the corpus of the property. In 1954, the founder executed another deed purporting to cancel the wafk deed and to settle the property on his second wife, namely, the second defendant. The second defendant made a transfer of the property to the third defendant the appellant in this second appeal. The suit which has given rise to this second appeal was instituted during the lifetime of the founder, namely, the first defendant. In the plaint as laid, the plaintiff prayed for a declaration that the cancellation and the alienation in favour of the third defendant were void. After the first defendant's death, the plaintiff amended the plaint so as to pray for possession.

Defendants 2 and 3 pleaded that the deed could not take effect as a wakf deed ; and secondly, that the deed was not intended to be given effect to and had never been given effect to.

* S.A. No. 486 of 1957. 7th November, 1959.
(16th Kartika, 1881—Saka).

The first question for decision in this appeal is whether the deed could not, in law, take effect as a deed of wakf. The religious object which the deed provides for is the performance of fatia and feeding of fakirs on the Prophet's birthday; and it was directed by the founder of the wakf that after his death, the net income from the property should be taken by his daughter and her descendants, who, after his death, would be the trustees of the charity.

On the facts, the case before us cannot be distinguished from the case reported in *Syed Ahmed* v. *Julaitha Bivi*[1]. The charitable purposes provided for in the deed of wakf considered in that case were the performance of one Movulthu and one Hattam in the name of the Prophet, one Hattam in the name of Andawar, one Hattam in the name of Meera Akamad Shakathari and one Hattam in the name of the wakif after his death. There was a further provision for recitation of Mavulthu in the name of the Prophet and distribution of food at a cost of Rs. 100. The total expenses directed to be incurred for the performance of these services amounted to Rs. 160. The annual income of the property was Rs. 1,500. The rest of the income was directed to be distributed among the four daughters and their descendants from generation to generation. In the case before us Rs. 5 amounting roughly to a thirtieth of the income of the property which is given in the plaint as Rs. 150 per annum was directed to be spent on the religious objects mentioned in the instrument and the rest of the income was directed to be taken by the trustees after the wakif's lifetime, namely, his daughter and her descendants.

It is argued that, since the income other than the sum of Rs. 5 directed to be spent on the performance of fatia on the Prophet's birthday and the feeding of the poor on that day, is directed to be given not to the wakif's descendants as such but to the wakif's descendants in their capacity as Muttavallis, the object of that part of the instrument cannot be said to be the maintenance and support of the descendants of the founder of the wakif. I am unble to agree. The wakif's daughter and descendants were constituted trustees in order to prevent them effectively from alienating the properties. The document expressly states that subject to the obligation to spend Rs. 5 on the performance of the charity and to pay the kist, they might utilise the income for their own benefit without any power of alienation. They are described as trustees in order to make it clear that they have no power of alienation over the properties and are subject to the obligation of performing the charities described in the instrument. Otherwise, the purpose of the beneficial interest conferred on them is not to remunerate them for the services they render as trustees, but to provide for their maintenance and support because they are the descendants of the wakif. I find that the main purpose of the instrument was to provide for the maintenance and support of the plaintiff and her descendants and that it was a concurrent purpose that Rs. 5 a year should be spent on the charity specified in the instrument, namely, the performance of the fatia and the feeding of fakirs on the Prophet's birthday.

Under section 3 of the Mussalman Wakf Validating Act (VI of 1913), it is lawful for a Muslim to create a wakf which, in all other respects, is in accordance with the provisions of Mussalman Law, for the maintenance and support of his children or descendants provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. We have before us a case where a wakf is created for the maintenance and support of the descendants of the wakif and at the same time for a purpose recognised by the Mussalman Law as a religious purpose of a permanent character. But there is no express provision in the wakf deed that, in the event of the plaintiff failing to have descendants, that is to say, the plaintiff's line of descendants becoming extinct, the entire property will be applied for the other purpose stated in the instrument, namely, the performance of fatia and the feeding of the poor on the Prophet's birthday. It is argued, that since there is no express provision about the reservation of

1. (1946) 2 M.L.J. 335.

the ultimate benefit for the poor or for any purpose recognised as religious, the wakf fails even on the terms of section 3 of the Act. But the proviso to section 3 does not require that the reservation of the ultimate benefit should be by express terms found in the document. Such reservation may be implied. The case already cited is authority for the proposition that a concurrent and immediate gift for permanent charitable objects in a wakf created in favour of one's own children and descendants may be held to warrant the implication of an ultimate trust for those objects on the failure of descendants. I hold that, in this case, the reservation in favour of the religious object, namely, the performance of fatia and feeding of fakirs on the Prophet's birthday on the failure of the line of plaintiff's descendants, may be implied and that the wakf is valid under the Muhammadan Law.

The next point is whether the instrument of wakf was intended to be real and was acted upon. It is said that the first defendant had debts and that he executed the wakf deed and other deeds on the same day with a view to defraud his creditors. If it was intended to defraud creditors without being executed nominally, then the deed would be voidable at the instance of the creditors. No creditor has sought to avoid it. Hence the question of intent to defraud creditors does not directly arise for consideration. On the other hand, the deed may be executed nominally without any intention to transfer title to the charity or to the persons mentioned in the deed. On that question, it has to be noted that patta was transferred in favour of the charity and continued to stand in the name of the charity until 1954. The defence witnesses say that fatia has not been performed and fakirs are not being fed as stated in the document. On the other hand, the evidence of P.W. 1 is that fatia was being performed and fakirs were being fed, even before the instrument was executed and that the charity was continued after the execution of the document. I accept the evidence of P.W. 1 on the point. But even if the charity was not performed, that could not invalidate the wakf which had been validly created. I see no reason to take the view that the wakif did not intend the instrument to take effect. I hold that he intended to extinguish his own title and make the charity the owner of the property.

The appeal is dismissed with costs.

No leave.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S. P. K. K. Kader Mohideen of Pettai .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 44-D—Scope and applicability—Transfer of income to persons resident or ordinarily resident abroad—Liability to tax.

Section 44-D is designed to prevent avoidance of income-tax by persons who were liable to tax in respect of income producing assets by adopting the device of transferring them to persons outside the taxable territories retaining in themselves the power of enjoyment of the income. In such a case even if the income is received by a person who is not taxable by reason of his not being a resident, it is deemed to be income received by the transferor and rendered liable to tax. If the assets transferred constituted the entire capital of the foreign company, it would follow that the entire profits of the company and not merely the dividends which the company chose to declare should be held to be the income of the assessee. The section will not, however, apply if the transfer of assets was not for the purpose of avoidance of tax liability, or if was a *bona fide* commercial transaction, not designed for the purpose of avoiding tax liability. The burden of proving this would be on the assessee. Where there is no such proof two conditions must be satisfied: (1) that the transfer of assets should be by a resident in India to a person not so resident or not ordinarily resident in India in such a way that the income in respect of those assets becomes payable to the latter, and (2) notwithstanding the transfer the transferor has power to enjoy at present or in future the income received by the transferee in the foreign country.

*Case Referred No. 45 of 1954. 3rd November, 1959.
(12th Kartika, 1881—Saka).

Section 44-D provides for the assessment of the person who transferred the assets. If two persons transfer their respective assets it stands to reason that section 44-D should be applied to them individually and each of them taxed in respect of the assets transferred by him.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 55 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. No. 348 of 1953-1954 on its file for decision on the following questions of law.

K. Srinivasan and *K. Narayanaswami*, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondent.

The Order of the Court was made by

Ramachandra Iyer, J.—The following question was referred to us under section 66 (1) of the Income-tax Act :—

"Whether the assessment of the entire profits of S. P. K. Kader Mohideen and Co., Ltd, in the hands of the assessee for assessment year 1949-1950 invoking the provisions of section 44-D of the Indian Income-tax Act is valid ?"

When the reference came up for hearing, it was found that, in order to answer the question referred to, certain matters had to be elucidated, and accordingly the Income-tax Appellate Tribunal was called upon to send a further statement of the case with specific findings on the following points :—

(1) Whether the assessee returned the dividend income of his wife and minor sons in discharge of the statutory liability imposed by section 16 (3) of the Income-tax Act or because of his consciousness that he was the real owner of the shares.

(2) Whether the consideration paid for the shares by P. M. Mohammad Naina Sahib was out of his own monies or was it contributed by the assessee himself from out of his own funds.

(3) Whether the consideration paid for the shares by Md. Salihu, a nephew of the assessee, emanated from Salihu's own funds or did they come out of the assessee's funds.

(4) Did the assessee's power to enjoy the income of the company extend to the whole of the company's income or to any lesser extent, and if so, to what extent ?

(5) Was there any fresh material for the Tribunal to come to the conclusion in this appeal different from or in addition to the material the Tribunal considered in relation to the earlier assessment years 1947-1948 and 1948-1949.

The Tribunal has submitted a further statement, as directed. The facts relating to the reference are :—The Assessee, S. P. K. Kader Mohideen, who was ordinarily resident in Pettai in Tirunelveli District, was carrying on business in the manufacture of ball threads at No. 174, Dam Street, Colombo, for about 20 years, under the name of S. P. K. Kader Mohideen Company. That was his sole proprietary concern. The assessee was assessed to Indian income-tax as an individual on the income that accrued from his business in Ceylon. In the books of the concern there were credits in the names of himself, his wife, Majitha Beevi, and his two minor children, Pir Muhammad and Pir Mohideen. There were also amounts outstanding in the names of Muhammad Salihu and Muhammad Sali. It is stated on behalf of the assessee that the two names represent the same individual, *viz.*, his nephew, Muhammad Salihu. On 1st May, 1946, a private limited company, S. P. K. Kader Mohideen Co., Ltd., was formed at Colombo, and it was incorporated in Ceylon under the Companies Ordinance LI of 1938. The business, till then carried on by the assessee, was transferred to the limited company. In consideration of the transfer of assets, the company allotted shares to the assessee and to his relations, whose respective holdings were :—

1.	The assessee, 2,000 shares at Rs. 10	..	Rs. 20,000
2.	His wife, Majitha Beevi, 500 shares at Rs. 10	..	Rs. 5,000
3.	His minor son, 250 shares, at Rs 10	..	Rs. 2,500
4.	His another minor son, 250 shares at Rs. 10	..	Rs. 2,500
5.	His nephew, Mohammad Salihu, 500 shares at Rs. 10	..	Rs. 5,000
	Total	..	Rs. 35,000

One year later, one P. M. Md. Naina, an employee of the assessee, was allotted 10 shares of the value of Rs. 100, and the share capital of the company became Rs. 35,100. The company was making profits, and the assessee made a return of his income by including also the dividend income in respect of the shares standing in the names of his wife and minor sons.

In the assessment year 1947-1948, which related to the year of account in which the company was formed, the Income-tax Officer held that the entire profits of the company be included in the assessment under section 44-D of the Income-tax Act, as the assessee had failed to prove that the transfer of assets of the foreign company was not made with a view to avoid a liability to taxation. In view of the fact, that the majority of the shares in the company were owned by the assessee, the other shares being in the name of his near relations, the officer held that the assessee had the power to enjoy the income of the Company. He, therefore, included in the assessable income of the assessee the entire profits of the company. There was a similar assessment for the year 1948-1949. Both the assessments were confirmed by the Appellate Assistant Commissioner. Appeals were filed by the assessee to the Appellate Tribunal. The Tribunal held that, out of the total share holdings in the Company, 2,000 shares alone were owned by the assessee, the remaining 1,600 shares (which is a mistake for 1,510) being acquired by his relations " out of their own monies which were lying with the business, and that there was no evidence whatever that the money belonging to the assessee was utilised for obtaining the allotment of those shares ". The Tribunal also held that there was no evidence to show that those persons allowed the assessee to enjoy the fruits of their investments. The result was that the assessee was taxed only on his income, which included the dividend income of his wife and children under section 16 (3). This order was passed on 12th November, 1951.

In the meanwhile, the Income-tax Officer had taken up the assessment for the year 1949-1950. Following his former view which stood then affirmed by the Appellate Assistant Commissioner, he held that the profits earned by the Company should be treated as the profits of the assessee, by applying the provisions of section 44-D. An appeal was taken to the Appellate Assistant Commissioner; by the time the appeal came to be heard, the Income-tax Appellate Tribunal had rendered its judgment in respect of the assessment for the years, 1947-1948 and 1948-1949. As there was no fresh evidence, the Appellate Assistant Commissioner applied the decision of the Tribunal for the previous years, and held that the assessee could not be taxed on the basis of section 44-D. The Department contested that order in an appeal to the Income-Tax Appellate Tribunal. The Tribunal reversed their former conclusion, and held that the entire assets transferred to the company belonged exclusively to the assessee, that the various credits in the names of his wife, nephew and children were fictitious, and the assessment should be completed by applying the provisions of section 44-D.

Section 44-D is designed to prevent avoidance of income-tax by persons who were liable to tax in respect of income-producing assets by adopting the device of transferring them to persons outside the taxable territories, retaining in themselves the power of enjoyment of the income. In such a case, even if the income is received by a person who is not taxable by reason of his not being a resident, it is deemed to be income received by the transferor and rendered liable to tax. A company incorporated in a foreign country should be considered to be a person domiciled in that country. Therefore, if assets are transferred to a company incorporated outside India (*e.g.*, Ceylon), the income earned by the company in respect of those assets would be treated as that of the assessee who transferred the assets, provided he had the power to enjoy the income. If the assets transferred constituted the entire capital of the foreign company, it would follow that the entire profits of the company (the assessee having a power to enjoy its income), and not merely the dividends which the company chose to declare, should be held to be the income of the assessee. The section will not, however, apply if the transfer of assets was not for the purpose of avoidance of tax liability, or if it was a *bona fide* commercial transaction, not designed for the purpose of avoidance of tax liability. That a transfer of income-producing

assets of an assessee to a person of foreign domicile is not one for the purpose of not avoiding a liability to tax or one of a *bona fide* commercial nature not designed for the purpose of avoiding such a liability should be proved by the assessee. Where there is no such proof, two conditions must be satisfied before the provisions of section 44-D are applied: (1) That the transfer of assets should be by a resident in India to a person not so resident or not ordinarily resident in India, in such a way that the income in respect of those assets becomes payable to the latter, and (2) that notwithstanding the transfer, the transferor has power to enjoy at present or in future the income received by the transferee in the foreign country.

In the present case, there has been a transfer of income-producing assets by the assessee to the company incorporated at Ceylon, which should be considered as a person having foreign domicile. The interest possessed by the assessee in the company, and the fact, that the other shares in the company are vested in his wife, children and nephew, (the 10 shares in favour of his clerk being left out of account) would justify the conclusion that the assessee had power to enjoy the income of that company, as he would be able, whether directly or indirectly, to control the application of the income within the meaning of section 44 (55) (*e*).

Section 44-D provides for the assessment of the person who transferred the assets. If two persons transfer their respective assets, simultaneously or otherwise, it stands to reason that section 44-D should be applied to them individually, and each of them taxed in respect of the assets transferred by him. We have already indicated that, if the assets transferred, covered the entire capital of a company, the entire profits of the company would be taxed as the income of the transferor. But, if what is transferred is only part of the capital of the company, the other being supplied by another person, the entire profits of the company could not be taxed in the hands of one alone or not even both taken as a single assessee.

Therefore, the question to be decided, as the Tribunal has rightly pointed in the further statement of the case, is as to whether the entire assets, which were transferred to the company, belonged to the assessee.

In the further statement of the case, the Tribunal observed that the shares standing in the names of all the shareholders were paid for by the assessee, and that, therefore, he was the real owner of all the shares.

In the books of S. P. K. Kader Mohideen Company, there were credits in the names of Majitha Beevi, his wife, his children and Salihu, his nephew. These monies were also transferred to the company. If the monies belonged to the persons, in whose names they were credited, the assets transferred could not be said to be those of the assessee alone; the allotment of shares would be genuine. This leads us to consider whether the Tribunal had the material to come to a conclusion that the entire share capital of the company belonged to the assessee, or whether part only belonged to him.

Majitha Beevi, the wife of the assessee, had two accounts in the books of the assessee's former concern, namely, Nos. 4 and 39. Rents from two properties, Nos. 172 and 174, Dam Street, Colombo, were regularly credited in those pages, while the tax thereof were debited. No. 39 account showed a credit balance of Rs. 3,251 as on 31st March, 1946. That was transferred to No. 4 account on that date which already showed a credit balance of Rs. 3,885, which together, with the sum of Rs. 150 which was credited next month as rent for the premises, made the total credit of Rs. 7,286. On 29th May, 1946, an amount of Rs. 5,000 is debited against Majitha Beevi for purchase of 500 shares in the company. The question is to whom did this money belong? The assessee's case is that the credit balance represented the accumulation of rental income of Majitha Beevi in respect of Nos. 172 and 174, Dam Street, which he purchased and gifted to her. The Tribunal has now discredited this case on the ground the gift had not been proved. In our opinion, the truth or validity of the gift was not open to challenge at that stage of the proceedings. In the original agreed statement of the case, it was stated as follows :—

"The ledger account of Majitha Beevi, a copy whereof is annexed hereto as Annexure 'B' and forms part of the case, contains in bulk rent collected from a property in Ceylon originally bought by the assessee out of his own funds and in his own name on 1st July, 1942, but subsequently gifted by him to her on 1st September, 1943."

Annexure 'B' to that statement of the case is a copy of the accounts which shows that the income from those properties was credited in the name of the lady. There was no question, therefore, that the monies standing to the credit of Majitha Beevi in the accounts of the assessee did not belong to her. The finding of the Appellate Tribunal was that the shares were taken *benami* by the assessee himself. That would depend upon the circumstance, whether the assessee paid for the shares standing in the name of Majitha Beevi or whether Majitha Beevi's monies were utilised for them. It is not disputed that the sum of Rs. 5,000 subscribed for the shares held in the name of Majitha Beevi, came from the income from the two properties which should be held belong to her. The source of the money being shown as Majitha Beevi's it cannot be held that she held the shares *benami* for her husband. She, and not the assessee, should be held to have transferred that sum to the company.

The same cannot, however, be said of the other shareholders, namely, the two minor sons of the assessee, and Md. Salihu, his nephew. By a transfer of amounts standing in the name of Md. Salihu there was a credit in the name of Md. Salihu for Rs. 7,065. On 31st April, 1945, a sum of Rs. 2,500 was transferred to the assessee's son, Pir Muhammad, from that account, and, a year later, the balance was wholly transferred for the purchase of shares in the name of the nephew. On this material the Tribunal should come to the conclusion that these operations indicated that the assessee and not the nephew was the real owner of the money. The Tribunal found that the monies standing to the credit of Md. Salihu and the minor sons belonged to the assessee. We accept that finding. But the matter stands on a different footing in regard to the 10 shares allotted in 1947 to Md. Naina. There is the uncontradicted evidence that he paid for them. That is also corroborated by the entries in the account books. There is no evidence to show that those shares were held by Md. Naina *benami* for the assessee.

The result is that a transfer of the assets to the foreign company was made by the assessee as well as by his wife, Majitha Beevi, and his servant, Md. Naina, each out of their own monies.

The Tribunal has given three reasons, which, in their opinion, would show that the assessee was solely entitled to the profits from the foreign company. The first was that, while the assessee had overdrawn his account, the dividend accounts of his wife and children and nephew remained undrawn. We cannot see how this circumstance, can, in any way, suggest that the assessee was the real owner of the shares standing in the name of his wife.

The second reason was that the dividends of the year ending 31st March, 1947, were issued by bearer cheques. That circumstance can have no relevance to the determination of the question involved, as it is not suggested that the assessee himself realised and appropriated the dividend amounts. The Tribunal has relied on a letter, dated 9th August, 1947, written by the assessee's auditor to him as supporting a case, that the formation of the company was designed to avoid tax liability. There is nothing in that letter to support any such inference.

The next reason given was that the assessee did not inform the Income-tax Officer, in September, 1946, of the formation of the new company, when he was called upon to pay advance tax under section 18-A. The fact, that the individual business was closed and a limited company had taken over its place, had been proved by the registration of the company and the Memorandum of Articles of Association therefor. The circumstance, that the company came into existence from 1st May, 1946, was never in dispute.

In view of the fact, that the entire assets which were transferred to the limited company did not belong to the assessee, it follows that the assessee would be entitled only to the dividends from that foreign company, and not the entire profits. The assessee has disclosed, under section 16 (3), the income from the dividends received

by his wife and minor sons in his return. It could not, therefore, be said that the transfer of assets was made for the purpose of avoiding income-tax.

In the further statement of the case, the Tribunal has not indicated as to whether there was any fresh material which induced them to come to a conclusion contrary to the one they did in respect of the assessment years, 1947-1948 and 1948-1949. The order in the previous case shows that the accounts must have been looked into by the Tribunal. It is clear from the order of the Income-tax Officer as well as the Appellate Assistant Commissioner that no fresh evidence was produced in the case. Under the circumstances, there was really no basis for the Tribunal to come to a different conclusion. That apart, the circumstances indicated above show that the transfer of assets from the proprietary concern of the assessee to the limited company was not made with the object of avoiding Indian income-tax, and that, even otherwise, section 44-D will not apply to the present case to the extent of rendering the entire profits of the company assessable. The question referred is answered in the negative and in favour of the assessee.

The assessee will be entitled to costs. Advocate's fee Rs. 250.

V.S. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Commissioner for Hindu Religious and Charitable Endowments, Madras .. *Appellants**

v.

A. P. S. Sethurama Pillai and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), *section* 84—*Scope—Proceedings before the Board—All the trustees not made parties—Order of the Board not binding on the institution—Public temple or Private temple—Tests.*

It is well settled that where there are more trustees than one all would be entitled to act jointly, they would be in the position of joint trustees and form a corporate body. A scheme providing for the management of a private temple by turns amongst the members of a family would be only an arrangement *inter se*, but outside the family, the co-trustees would form a corporate entity. The representation of an institution could be valid or effective only if all the trustees jointly act; *a fortiori* the institution could be bound by an order of the Board under the Act only if all the trustees are impleaded to the proceedings before the Board.

Where there is no proof that any dedication of the temple to the public has been made or that the public worshipped in the temple as of right at any time, the institution is a private temple only and the Board would have no jurisdiction to initiate proceedings or regulate the management by a scheme in respect of such a private temple under the Act.

Deokinandan v. *Muralidhar,* (1957) S.C.J. 75 : (1957) 1 M.L.J. (S.C.) 28, referred.

Appeals against the decrees of the District Court, Tiruchirapalli, in O.S. Nos. 7 and 8 of 1951 and O.P. No. 131 of 1951, respectively.

The Government Pleader (*K. Veeraswami*) and *N. Ramachandran,* for Appellant in all the appeals.

M. K. Nambiyar, T. R. Srinivasan, T. Ramalingam, K. S. Desikan, K. Raman and *R. Sitaraman,* for Respondents in Appeal No. 63 of 1955.

A. V. Narayanaswami Ayyar, R. Venkatachalam, K. S. Desikan, K. Raman, R. Sitaraman and *T. R. Srinivasan,* for Respondents in Appeal No. 131 of 1955.

A. V. Narayanaswami Ayyar, R. Venkatachalam, K. S. Desikan, K. Raman and *T. R. Srinivasan,* for Respondents in Appeal No. 132 of 1955.

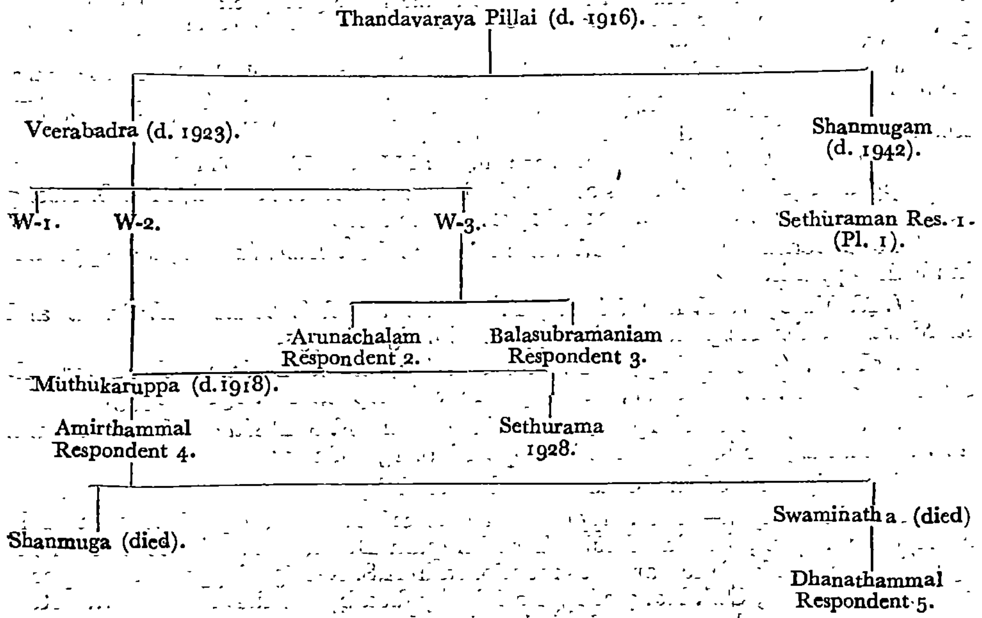
The Judgment of the Court was delivered by

Ramachandra Iyer.—These appeals relate to Sri Dandayuthapaniswami temple at Ayyampalayam, Musiri Taluk, Tiruchirapalli District. It will be convenient to refer to the rank of the parties as mentioned in A.S. No. 63 of 1955. That appeal arises out of a suit, O.S. No. 7 of 1951 originally filed by the first respondent. Respondents 2 and 3 who were impleaded as defendants to the suit were later trans-

*Appeal Nos. 63, 131 and 132 of 1955. 7th August, 1959.
(16th Sravana 1881—Saka).

posed as plaintiffs 2 and 3. A.S. No. 131 of 1955 arises out of O.S. No. 8 of 1951 filed by the sixth respondent. The suits were filed under section 57 of the Madras Hindu Religious Endowments Act (Act II of 1927), to set aside a scheme framed by the Madras Hindu Religious Endowments Board in O.A. No. 513 of 1949 for the management of Sri Dandayuthapaniswami temple. The Board, who was the first defendant to the suit, is now represented by the appellant, the Commissioner for Hindu Religious and Charitable Endowments, Madras. Appeal No. 132 of 1955 is filed against the order of the Lower Court in O.P. No. 131 of 1951, which set aside the order of the Hindu Religious Endowments Board in O.A. No. 513 of 1949 which held that the temple was one to which the provisions of Act II of 1927 would apply.

The family of the respondents owned considerable properties in Tiruchirapalli District. More than 100 years ago they had established a chathram for feeding the poor. They had also set apart certain villages, Pallur, Kallur, Ayyampalayam and Kilakudi for the expenses of the charity aforesaid and for other charities. There were two branches of the family tracing their origin to a common ancestor, Thandavaraya Pillai. By the year 1871 one of the branches became extinct. The other was represented by Thandavaraya Pillai, the grandfather of the first respondent. He, out of his private funds, commenced in the year 1883 the construction of the temple for Sri Dandayuthapaniswami at a place situate about 100 feet south of the chathram. The foundation stone for the temple was laid by Sri Narasimha Bharathiswami the then head of the Sringeri Mutt. The construction was completed by the year 1885. In the temple were installed in addition to the principal deity, Sri Dandayuthapaniswami, Sri Parvathi Parameswara, Sri Srinivasa Perumal, Karupanna Swami or Neelamegaswami, the family deity of the respondent, an image of Sri Adi Sankara and also one of the family guru, Sri Narasimha Bharathi. Since then the management of the temple was solely with Thandavaraya and after him with the members of his family, and the expenses were met out of a portion of the income set apart for the charity and also by contributions by the family. Thandavaraya died in 1915. It would be useful to refer to the following geneology to appreciate the questions which arise in the case.



During the lifetime of Thandavaraya there were disputes in the family. A suit for the possession of the chathram properties was filed by Shanmugam against Thandavaraya on the ground that there was a previous partition of the family properties, under which the management of the endowment was to be enjoyed by turns

by each of the sharers. Shanmugham's claims were, however, negatived in that litigation. The judgment of this Court which finally dealt with the matter is reported in *Thandavaraya* v. *Shanmugam*[1]. The quarrels between the members of the family did not, however, stop with the termination of that litigation. Thandavaraya filed O.S. No. 21 of 1913 against Shanmugam and others for partition of the family properties. During the pendency of the suit Thandavaraya died; Veerabadra and his children were transposed as supplemental plaintiffs to the action. On 27th September, 1916, a decree by virtue of a compromise was passed for partition. In that decree the family temple, chathram, etc., and the properties set apart for the same were agreed to be managed by each of the branches by turns of three years at a time. During the lifetime of Veerabadra there were partition disputes between himself and his two major sons Muthukaruppa and Sethurama. Muthukaruppa predeceased his father, leaving two sons. Veerabadra died in 1923 being survived by Sethurama, his son, through his second wife and two other sons by his third wife. It is stated that sometime prior to his death he executed a will appointing Shanmugam as the guardian of his two minor sons for the purpose of conducting the anna-chatram vagaira charities. Sethurama died in 1928. Veerabadra's branch is now represented by respondents 4 to 7.

Shanmuga died in 1942, leaving behind the first respondent as his son. During the lifetime of the former, the Madras Hindu Religious Endowments Board, constituted under Act I of 1925, issued a notice under section 80 of the Act for determining whether the temple of Sri Dandayuthapaniswami was one to which the provisions of that Act would apply. Shanmuga disputed the applicability of the Act to the temple, and contended that the temple was a private one. In the meanwhile Act I of 1925 was repealed and re-enacted as Act II of 1927. By its order, dated 29th August, 1927, the Board held that the temple was a public one, and that the provisions of the Act would apply to it. They also held that the trusteeship was hereditary in the family of Shanmugam and declared it to be an excepted temple. Exhibit B-6 is the order of the Board and Exhibit B-4 is the Annexure to the order containing the reasons for the declaration. Shanmuga filed O.P.No.124 of 1928 in the District Court, Tiruchirapalli, under section 84 (2) of Hindu Religious Endowments Act of 1927, contesting the decision of the Board and praying for the setting aside of the same. Shanmuga also applied to the Government for an exemption of the institution from the operation of the Act. The President of the Board, whose opinion would be sought by the Government before any order for exemption was made, required Shanmuga to get an allocation of the income from the charity properties between the religious and charitable purposes. That allocation has to be made by the Board itself. A petition was filed by Shanmugam for the purpose.

It is clear from the evidence that the Government were willing to consider the question of exemption only if the petition under section 84 was withdrawn. The petition was withdrawn on 3rd March, 1931. The Government passed an order exempting the temple during the lifetime of Shanmugam and respondents 1 to 3 from the operation of sections 18, 43 to 48, 61 to 67, 76, 78 and 84 of the Act. There was some controversy before us, as to when the order of exemption was actually passed or became effective. We shall refer to that matter at a later stage. The order on the petition for allocation was made on 9th September, 1931. Exhibit B-10 is the order, under which two-thirds of the net income derived from the properties endowed were set apart for the religious purposes, *viz.*, for the anna-chathram. The result of the exemption granted by the Government was that the temple was being managed as before by the members of the family subject to the accounts of the temple being regularly maintained and audited. On 1st December, 1944, the Government withdrew the exemption granted to Sri Dandayuthapaniswami temple in so far as it related to sections 45 to 48 and 61 of the Act. *Vide* Exhibit B-7. In the year 1946, the 1st respondent conceived the idea of constructing a teppakulam or tank for the temple to facilitate the celebration of a floating festival. With the previous sanction of the Board a teppakulam was constructed, the expenses having been met partly out of the temple funds and partly out of the contributions by the

1. I.L.R. 32 Mad. 167.

1st respondent. On 20th January, 1949, the Government withdrew all the exemptions that had been granted to the several temples, the suit temple being one of them. *Vide* Exhibit B-8. Shortly thereafter, the Hindu Religious Endowments Board initiated proceedings under section 57 of the Act in O.A. No. 513 of 1949 for framing a scheme in respect of the temple. The respondents objected to the scheme on the ground, that the temple was a private one that the Board had no jurisdiction to frame a scheme, and that even otherwise there was no necessity for one. The Board overruled the contentions made by its order, dated 19th December, 1950, framed a comprehensive scheme for the management of the temple. Exhibit B-5 is the Annexure to this order. The scheme was published on 13th March, 1951. The 1st and the 6th respondents respectively filed O.S. Nos. 7 and 8 of 1951 contesting the jurisdiction of the Hindu Religious Endowments Board to frame the scheme and also the necessity and propriety thereof. A petition, O.P. No. 131 of 1951, was also filed by the 6th respondent purporting to be under section 84 (2) for setting aside the order of the Board holding that the temple of Sri Dandayuthapaniswami was a temple as defined by the Act.

The suit was contested by the Board on the ground, that the temple was a public one and that the scheme framed was proper in the circumstances of the case. The Board also took the plea that it was not open to the respondents to contest the character of the temple, as the order in Exhibit B-6 had become conclusive by reason of the fact that the application filed in 1928 under section 84 (2) was withdrawn.

The learned Judge upheld the claim of the respondents. He held that the temple was a private and not a public one, that the respondents were not barred by reason of the order contained in Exhibit B-6 that the provisions of section 84 (2) could not properly apply to a case where the dispute was whether the temple was a private or a public one, and that even otherwise the order could not be held to be final, as the Government had exempted the temple from the operation of section 84 after the filing of O.P. No. 124 of 1928. On the other issues he held that the scheme was not justified in the circumstances of the case. On those findings he set aside the scheme, dated 19th December, 1950, framed by the Hindu Religious Endowments Board. O.P. No. 131 of 1931 was also allowed. The Commissioner for Hindu Religious and Charitable Endowments, Madras, who now represents the former Board of Commissioners, has filed the appeal against the decrees and order referred to above.

The two questions that arise for consideration in these appeals are: (i) whether the temple of Sri Dandayuthapaniswami at Ayyampalayam in the Tiruchirapalli District is a private or a public temple and (ii) if the temple is found to be a public one, whether there was necessity or justification for the scheme framed by the Board on 19th December, 1950, and even if it were necessary, whether it should be modified in any particular respect.

On behalf of the appellant it was contended that the order of the Board contained in Exhibit B-6 had become conclusive so far as the temple was concerned, and that it was no longer open to the succeeding trustees of the temple to challenge it. Exhibit B-4 is the Annexure to the order of the Board. That shows that in response to certain memoranda issued by the Board Shanmugam Pillai disputed the applicability of the Act to the temple. An enquiry was made by the Board. The Board held that the temple was one to which the provisions of the Act would apply, namely, that it was a public temple, but its trusteeship had been hereditary in the family of the disputant. It is clear from Exhibits B-4 and B-6 that Shanmuga was the only trustee to whom the memorandum was issued by the Board. The learned Government Pleader invited our attention to Exhibit A-19, a judgment of this Court in an appeal in regard to a dispute amongst the members of Veerabadra's branch. In the course of the judgment the learned Judges referred to a will executed by Veerabadra, whereby he appointed Shanmuga as the testamentary guardian for his two minor sons through his third wife, for the management of the chathram properties. In the judgment there is a passing reference to the circumstance that Shanmuga in his own name and on behalf of the minors filed a petition under section 84 of the Hindu Religious Endowments Act. But the copy of the petition itself has not been filed in the present case. Having regard to the recital in Exhibits B-4 and B-6 it is difficult to hold that Shanmugam filed any application under section 84 of the Act to the Board

in any dual capacity, *viz.*, on his own behalf and as guardian of the two minor sons of Veerabhadra. It is not shown how the appointment of a testamentary guardian in regard to the management of the trust properties could be valid. That apart, there is no evidence that Shanmuga ever purported to represent the heirs of Muthukaruppa or of Sethurama and his branch.

We have already referred to the provisions of the partition in the family under Exhibit A-9. Clause 13 of the compromise decree states thus :

> " The family temple, chathram vagairah charities and the properties set apart for the same shall be managed by the plaintiffs 2 to 6 branch for three years and by the defendants 6 and 7 branch for three years alternately ".

It is seen from Exhibit A-19 that Shanmugam's management ceased by July, 1928, and Veerabadra's branch would be entitled to the possession of the temple, the chathram and the properties for 3 years thereafter. There is no evidence in the case to show that the memorandum issued by the Board was ever brought to the notice of any member of Veerabadra's branch. Exhibits B-4 and B-6 do not show that Veerabadra's branch was at all represented before the Board. The learned Sub-Judge held that although the representatives of Veerabadra's branch (namely, respondents 4 to 7) were not parties to the proceedings the order could not any the less be binding on them. We cannot, however, agree with that view. Shanmuga represented one branch of the family. The other branch was entitled to an equal right with him in regard to the management. The members of that branch would along with Shanmugam form a body of co-trustees in whom the management of the temple should be deemed to be jointly vested. It is well settled that where there are more trustees or managers than one all would be entitled to act jointly ; they would be in the position of joint trustees and form a corporate body. They must execute the duties of their offices in their joint capacity and so far as proceedings in Court went they should be ordinarily joined in any suit with reference to the temple or endowed properties.

In *Ramanathan Chetty* v. *Murugappa Chetty*[1], Bhashyam Iyengar, J., observed :—

> "This argument proceeds on a misapprehension that when trust property is managed in rotation by co-trustees, the possession of the office by each during his turn is exclusive of or adverse to the other co-trustees. Though each of the co-trustees may during his turn in the rotation be regarded in a sense as the acting or executive trustee for the year (or period). . . . . . yet he holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. In fact, as a general rule, even during the turn of each co-trustee, all the co-trustees are entitled, and, in fact, are bound to act jointly in matters other than the ordinary routine duties."

It follows that whatever may be the number of trustees the office is a joint one, and the co-trustees all form as it were one collective trustee, and therefore must execute the duties of the office in their joint capacity. A scheme providing for the management by turns amongst the members of family would be only an arrangement, *inter se*, but outside the family, the co-trustees would form a corporate entity. The representation of the institution could be valid or effective only if all the trustees jointly act ; *a fortiori* the institution or the body of trustees can be bound only if they are all impleaded. No one of the co-trustees derives title under any one of them ; no one of them could be represented by another in legal or quasi legal proceedings. The right of management is vested in all of them, and in any proceedings initiated against the institution or against the trustees all of them should be parties.

Section 84 (1) states :

> " If any dispute arises as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such dispute shall be decided by the Board."

Section 84 (2) states :

> "A trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final."

A decision in order to bind the institution should be in a dispute between the institution or its accredited representative and another. One of several co-trustees could

1. (1903) 13 M.L.J. 341 : I.L.R. 27 Mad. 192.

represent neither the institution nor his co-trustees but only himself. This is particularly so, when the claim is that the institution was a private one belonging to the members of a divided Hindu family, where no divided member can represent the interests of another apart from any power granted by the latter. The provision of section 84 (2) is in conformity with that principle. Under that provision (section 84 (2)) a right to apply to the Court is given to an aggrieved trustee. In a case where there is more than one trustee the expression trustee in that section would mean all the co-trustees on the principle of interpretation contained in section 3, clause (35) of the Madras General Clauses Act, which states that words used in the singular shall include the plural. Section 84 (1) invests a jurisdiction in the Board to decide its own cause. Such a provision should be strictly construed. The provision though general in terms and would comprehend disputes raised by any person, should be construed in the light of and in conjunction with section 84 (2), which points out the remedy to rectify or challenge the decision of the Board. Section 84 (2) provides a right to challenge the decision of the Board only to a trustee. No other person would have any right to apply to the Court under section 84 (2). It should follow that the dispute under section 84 (1) should also be only with the trustee and not any other person as that other person could not apply under section 84 (2). We have already pointed out that a trustee would mean all the trustees acting jointly in a case where there is more than one trustee.

It is admitted that no notice of the memorandum issued by the Board was served on respondents 4 to 7. Sethurama was also alive till 1928. Those persons, who represented a section of Veerabadra's branch were co-trustees along with Shanmugam, but did not derive their title through him. They along with Shanmugam would form the body of trustees, and in the absence of any notice to them, it could not be held that there was a dispute either with the trustees or with the institution as such. It would follow that there was no dispute as contemplated by section 84 (1) or a decision.

Further it is an accepted principle of law that no person would be bound by an adjudication to which he was not a party except in cases of judgments *in rem*. It is not and cannot be contended that a decision under section 84 (1) is a judgment *in rem*. There was, therefore, no decision under section 84 (1) which the trustees acting as a body were bound to set aside. There being no valid decision, it was not obligatory on the part of the trustees to set aside such an order under section 84 (2). The fact that Shanmugam filed an application under section 84 (2) and withdrew the same cannot invest the order contained in Exhibit B-4 and Exhibit B-6 with any statutory finality.

The learned Judge held that an enquiry as to whether a temple was a public or a private one would not come within the purview of section 84 of the Act. The reasons for that conclusion was stated to be based on the definition of a temple as contained in section 9 (12) of the Act. It states :

> "Temple means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship".

The definition would mean that it is only when a temple is a public temple as defined by the Act that an enquiry under section 84 could be held. The Legislature itself recognised this defect in Act II of 1927 and amended section 84 in the year 1946 thus :

> "If any dispute arises as to. . . . . whether an institution is a mutt or temple as defined by the Act."

It is no doubt true that for the purpose of exercising its jurisdiction the Board might have to decide as to whether a temple is a public or a private one when a question was raised before it. Such a decision according to the learned Judge could not confer any finality on the finding that the temple was a private one.

The question whether the Board by erroneously giving a decision that a temple is a public one could give itself a jurisdiction under the Act need not be decided in the view we are taking.

In *Iswarananda Bharathiswami* v. *Commissioners, Hindu Religious Endowment Board*[1], *Narayanan* v. *Hindu Religious Endowment Board*[2], and the majority of the Judges in *Ramaswami Servai* v. *Board of Commissioners, H.R.E. Board*[3], answered the question in the affirmative. The opinion of Satyanarayana Rao, J., in the last of the cases was to the contrary. We prefer not to express our opinion on the question on this occasion.

The learned Judge further held that in view of the fact that the Government had exempted the Dandayuthapaniswami temple from the operation of section 84 of the Act, the trustees were relieved of the obligation to file an application and contest the decision of the Board under section 84 (1). In the plaint the first respondent stated that on the Government agreeing to exempt the temple from the operation of Act II of 1927 on 7th February, 1931, Shanmugam withdrew O.P. No. 124 of 1928 on 10th March, 1931. In the written statement of the appellant the plea was more specific. It was stated:

"While it (O.P. No. 124 of 1928) was pending he (Shanmugam) submitted a petition to His Excellency the Governor in Council praying for exemption of the temple from the operation of the provisions of the Hindu Religious Endowments Act. Finally the Government of Madras in Memorandum No. 2778/-1-A/2 L. & M., dated 7th February, 1931, passed an order exempting the temple during the lifetime of Messrs......".

According to the written statement the order for exemption was passed on 7th August, 1931. If this were so, the argument of Mr. M. K. Nambiar, for the respondents, that as the Court lost its jurisdiction over O. P. No. 124 of 1928 by reason of the fact that the Act ceased to apply no finality could be attached to the order under section 84 (1), will have to be considered. The learned Government Pleader represented to us that the averment in the written statement was not correct, as the order of the Government exempting the temple from the provisions of the various sections of the Act was passed only on 10th April, 1931 and not earlier. He requested us therefore to afford him an opportunity to substantiate that fact by producing the order dated 7th February, 1931 and the other papers relating to the G.O. embodied in Exhibit R-3. The mistake pointed out by the learned Government Pleader was in the pleading and before any evidence could be advanced it would perhaps be necessary for the appellant to apply for the amendment of the written statement. There has been no attempt to do that. Even so, it would be very doubtful whether additional evidence could be admitted at the present stage. In the view we are taking of the case, that Exhibits B-4 and B-6 would not be binding on the entire body of trustees, it is unnecessary for us to express any opinion as to the correctness or otherwise of the learned Judge's conclusion on this matter.

The question then to be considered is whether the temple is one that would come within section 9 (12) of Act II of 1927. It may be stated, private temples are rare in this part of the country. That does not, however, mean that there could be no private temples. Courts have frequently recognised the existence of private temples in this State. The decision whether a temple is a public one or private depends on the evidence in the case.

In *Deokinandan* v. *Muralidar and others*[4], the Supreme Court laid down the test for deciding whether a particular temple was public or private. They held that the distinction between a private and a public trust was that, whereas in the former the beneficiaries were specific individuals, in the latter they were the general public or class thereof. It was further held that the true beneficiaries of a religious endowment were the worshippers, and the test to decide whether an endowment was public or private was to ascertain whether it was the intention of the founder that specified individuals were to have the right of worship at the shrine or the general public or any section thereof. The main characteristic of a public temple is that it is intended for the use of the public or a section thereof. On the other hand private temples are

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1. (1931) 61 M.L.J. 117 : I.L.R. 54 Mad. 928.
2. A.I.R. 1938 Mad. 209.
3. (1950) 2 M.L.J. 511.
4. (1957) 1 M.L.J. (S.C.) 28 : 1956 S.C.R. 756 : (1957) S.C.J. 75.

intended for the worship by the members of the family of the donor exclusively. In the case of a public temple, the public would be entitled to worship therein as a matter of right, while in the case of a private temple such worship by persons other than the founder's family would be by the sufferance of the latter. The mere fact that outsiders are allowed to worship in a temple cannot necessarily mean that the temple was dedicated to the public, as no Hindu will ever prohibit strangers from offering worship to the deity enshrined in his private temple. In all such cases worship by outsiders is referrable to the leave and licence granted by the owner and cannot be indicative of any dedication to the public.

In the present case there are several circumstances which justify the conclusion arrived at by the learned Judge. [After discussing the evidence his Lordship concludes]

The result of the evidence is that there is no proof of there having been any dedication of the temple to the public. There is no acceptable evidence to indicate that the public worshipped in the temple as of right at any time. We, therefore, agree with the conclusion of the learned Judge that the temple is a private one.

On that conclusion *viz.*, that the temple of Sri Dandayuthapaniswami is a private temple, the Hindu Religious Endowments Board would have no jurisdiction to initiate proceedings under section 57 or regulate the management of the temple by a scheme. It is, therefore, unnecessary for us to consider the further question about the necessity or propriety of the scheme framed by the Board.

The appeals fail and are dismissed with costs in A.S. No. 63 of 1955.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

B. Ananthayya .. *Appellant**

v.

B. Subba Rao .. *Respondent.*

Transfer of Property Act (IV of 1882), section 6 (f)—Applicability—Agreement by younger brother in favour of elder brother to pay latter specified sum every month after he commence to earn income—Amount fixed if percentage of possible earnings—Promisor not bound to pay out of salary—Absence of relationship of lender and borrower—Agreement in consideration of natural love and affection—If void—Public policy—Penalty—Contract Act (I of 1872), section 74—Applicability.

Section 6 (*f*), Transfer of Property Act, prohibits the transfer of public office and the salary of the public officer whether before or after it has become payable. Where an agreement does not at all purport to deal with the salary of a public officer and does not by itself have anything to do directly with any public office, and when no head of a department, could, under the agreement, be requested to deduct for the benefit of the promisee any sum payable to the promisor, section 6 (*f*) cannot be invoked to invalidate it.

Where at the time of the agreement the promisor is only a university student, hoping to obtain a degree and then to commence earning income either as salary attached to a public office, or as salary in private employment, or as income in independent practice of a profession and the agreement only places the promisor under an obligation to pay the promisee (his elder brother who got the promisor educated and looked after the pecuniary and other material needs and comforts of the promisor) to pay the promisee a specified sum of money every month after the promisor began earning of income, for the maintenance of the promisee and persons dependent on him, the amount payable being based on the amount of the promisor's monthly earnings either by way of salary from an employer or otherwise and there being no obligation to pay the amount out of the salary or income that the promisor might earn every month, the agreement is not hit by section 6 (*f*) and cannot be held to be void. No question of public policy also comes into play in such a case.

When there is no relationship of debtor and creditor or lender and borrower, but the agreement is made out of natural love and affection by an younger brother to an elder brother for the maintenance of the latter and his dependents, no question of penalty arises and section 74 of the Contract Act cannot have any application.

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*S.A. No. 90 of 1958. 7th September, 1959.
(16th Bhadra, 1881—Saka).

Grenfell v. *The Dean and Canons of Windsor*, (1840) 48 E.R. 1290 at 1292, *Corporation of Liverpool* v. *Wright*, (1859) 28 L.J. 868, *Postmaster-General, Bombay* v. *Chenmal Mayachand*, I.L.R. (1941) Bom. 415 and *Sundara Reddy* v. *Jagannathan*, A.I.R. 1927 Mad. 818, distinguished.

Appeal against the Decree of the City Civil Court (Principal Judge), Madras, in Appeal Suit No. 71 of 1956 preferred against the Decree of the City Civil Court, (II Assistant Judge), Madras, in Original Suit No. 616 of 1954.

B. V. Viswanatha Ayyar, for Appellant.

S. Rajaraman and *N. V. Nagaraja Ayyar*, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant and the respondent are brothers. They have two other brothers. The respondent is the eldest. The appellant is the youngest. Their father died in 1927. The appellant was then 10 or 11 years old. He was a student in the First Form in the School in their village in the South Kanara District. After the father's death, the respondent placed himself in the position of a father in relation to the appellant. The respondent got the appellant educated. The appellant passed the High School examination. He had been endowed by nature with intelligence of a high order. He was admitted into College and passed Intermediate in the first class. He then secured admission in the Engineering College at Guindy. The respondent was looking after all the pecuniary and other material needs and comforts of the appellant. Scholarship was secured for him from the Government. Contribution towards the expenses of education was secured also from the Madhwa Association. Some friends too helped. The respondent contributed the balance needed for the appellant's expenses and maintenance out of his (respondents's) meagre salary of about Rs. 30. They had some small ancestral property in the South Kanara District. The respondent was a cook in the Cosmopolitan Club.

In 1938 the appellant completed three years of his course in the Engineering College. He had another year to do at College and a year of practical course ahead of him before he could hope to secure an appointment and earn a living. At that stage, the respondent considered that the appellant should agree to make some provision for the respondent's own maintenance after the appellant began to earn a livelihood for himself and the members of his family. Just as the respondent had taken care of the appellant in his boyhood and youth, the respondent thought that it was the appellant's duty to take care of the respondent in his old age. The appellant agreed. As a result, the appellant executed an agreement in favour of the respondent on 17th May, 1938. That agreement said that, in consideration of moneys spent by the respondent on account of the appellant out of the respondent's earnings and in consideration of the moneys that would be spent by the respondent in future and out of natural love and affection, the appellant relinquished in favour of the respondent the appellant's interest in the joint family properties and that the appellant would, further pay the respondent on account of the maintenance of himself and the members of his family after the appellant began to earn a salary or income, sums which would represent a percentage of his monthly income. So long as the appellant's income was only Rs. 50 per month, he should pay the respondent Rs. 5 per month ; when the income rose to Rs. 90, he should pay the respondent Rs. 13 per month ; when the appellant's income rises above Rs. 100 a month, the appellant should pay the respondent Rs. 15 for the first hundred and 12½ per cent. of the balance. Payments at that scale should continue until 1958. If the respondent died before 1958 payments should be made till the end of 1958 to the respondent's dependents. If the respondent survived 1958 payments should thereafter be made to the respondent at the rate only of 5 per cent of the income of the appellant in case the appellant's monthly income continued to be more than Rs. 300.

The suit which has given rise to this second appeal was instituted by the appellant in the City Civil Court for a declaration that the agreement was void and unenforceable. It was pleaded that the agreement had been procured by fraud,

coercion and undue influeence. The trial Judge as well as the Judge who heard the appeal in the lower appellate Court have both held that the agreement was not vitiated by fraud, undue influence or coercion and that the appellant's consent to the agreement was free. That is a finding which I see no reason to disturb in second appeal.

The appellant's learned counsel contends that the agreement was void as opposed to public policy. The appellant is at present an officer in the Public Works Department in Madhya Pradesh. When the suit was instituted, his salary was Rs. 410 per mensem.

An officer in the P.W.D. in Madhya Pradesh is the holder of a public office. Section 6 (*f*) of the Transfer of Property Act enacts

"A public officer cannot be transferred nor can the salary of a public officer whether before or after it has become payable."

The appellant's learned counsel contends that the agreement dated 17th May, 1938, although it was entered into long before the appellant became the holder of a public office, amounts to assignment of a portion of the salary of a public officer and is therefore void under section 6 (*f*) of the Transfer of Property Act, or should, in any event, be declared void on grounds of public policy.

In relation to that agreement, the first point to note is that the agreement does not purport to deal with the salary of a public officer. It relates to the income which the appellant might earn after becoming a B.E. of the Madras University. The income might be earned either as salary attached to a public office or as salary in private employment, or as income in independent practice of the profession. The agreement by itself has nothing directly to do with any public office. Under the agreement, no head of a department could be requested to deduct, for the benefit of the respondent, any sum payable to the appellants. The agreement placed the appellant under an obligation to pay the respondent a specified sum of money every month after the appellant began earning money. The payment was to be made for the maintenance of the respondent and persons dependent on him.

The second thing to note in relation to the agreement is that the appellant is not bound to pay the amount payable under the agreement out of the salary or income that he earns every month. He could pay it out of his savings or he could pay the money out of any dowry that he might get—he was a bachelor at the time of the agreement—or out of gifts of any other kind. The money that he had to pay had to be fixed on some basis. The basis chosen was the amount of his monthly earnings either by way of salary from an employer or otherwise.

I do not think that the cases cited by the appellant's learned counsel have any bearing on the facts of this case. In *Grenfell* v. *The Dean and Canons of Windsor*[1], it was held that the security granted by a canon over his share of the profits of his office was valid. In the course of his judgment, the Master of the Rolls (Lord Langdale) observed that, if the security had been in any way connected with public service, it might have been necessary to attend seriously to the argument that the remuneration was not assignable and that salaries and pensions attached to a public office could not be alienated because a public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. Since there is no assignment of salary in this case, these observations have no application to the facts before us.

In the *Corporation of Liverpool* v. *Wright*[2], the facts were: Certain categories of fees were attached to the office of a Clerk of the Peace. From a person appointed to that office, the Corporation took an agreement that he would accept a salary and would account for the fees. It was held that the agreement was void on two grounds of public policy, first because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that

1. (1840) 2 Beav. 542 : 48 E.R. 1290 at 1292. 2. (1859) 28 L.J. 868.

all the fees prescribed in relation to the office are required for the purpose of enabling the officer to uphold the dignity and perform properly the duties of his office. Since, in this case, there has been no agreement directly relating to any part of the salary which the appellant expected to draw or draws as an officer of the Government, that case can have no application.

In the case considered in *Postmaster-General, Bombay* v. *Chenmal Mayachand*[1], the judgment-debtor who was a postman was arrested in execution of a money decree. In order to earn his liberty, he agreed with the decree-holder that his officer should withhold every month Rs. 6 out of his salary of Rs. 40 until the decree debt was satisfied. But for that agreement no part of his salary of Rs. 40 could be attached. It was held that the agreement was void as opposed to public policy. The policy of the law as enunciated in section 60, Civil Procedure Code, is to ensure to a public servant the enjoyment of his salary in full if it is below the attachable limit. That policy could not be permitted to be defeated by private agreement that a part of the salary below the attachable limit be paid over by the disbursing officer to a creditor of the public servant. On the facts here, the appellant is in receipt of a salary which permits of attachment, if there was a decree, of sums in excess of the sums payable to the respondent. No question of public policy as stated in that ruling could come into play.

The other cases cited by the learned counsel for the appellant relate to agreement to permit attachment which the law prohibits under section 60 of the Civil Procedure Code.

I find that the agreement, dated 17th May, 1938, did not of its own force assign or effect a transfer of, any part of the salary of the appellant and that therefore the agreement is not void either under section 6 (*f*) of thd Transfer of Property Act or on any ground of public policy.

The appellant's learned counsel then contends that the payment provided for the benefit of the respondent and the members of his family is in the nature of a penalty and that this Court should grant relief to the appellant so as to make the terms of the contract equitable. I am unable to see anything unconscionable or inequitable in the terms of the agreement. The respondent had stood to the appellant in the position of a father, when the respondent was a young man needing the assistance which a person in the position of a father can alone give. The respondent naturally desired that, in his old age, he should be able to live in a state of comfort commensurate with the position which it was expected his younger brother would attain. A father might be entitled under the Hindu law to maintenance at the hands of the son. But an elder brother has no such rights. The respondent could therefore not call on the younger brother to pay for the respondent's maintenance in his old age, in the absence of an enforceable agreement. The appellant too realised the reasonableness of the respondent's desire and request and executed the agreement. The moneys payable were payable not by way of return for benefits received, but for the respondent's maintenance. In paying money for the appellant's maintenance and education, the respondent was not acting as a lender of money. He was acting as an elder brother discharging his obligation as the eldest member of the family to persons whom the father would have looked after if he had been alive. Therefore, in promising to pay to the respondent money for his maintenance in the future, the appellant was not making a promise to return moneys received, but to discharge his own obligations as a younger brother to an elder brother. It would not be correct—that is what both the brothers thought—that, after the appellant began earning money either as an officer of the Government or as officer in private employ, the respondent should live as an ex-cook. They thought that it was altogether proper that, after the appellant started earning money, the respondent should live as the elder brother of an Engineer. For that purpose, they agreed that the appellant should pay money on the scale provided

1. I.L.R. (1941) Bom. 415.

for in the agreement. The money that had been paid by the respondent to the appellant formed rather the motive for his promise than the consideration for the promise. The basic consideration was natural love and affection which then subsisted between the brothers. No " consideration " is necessary for the effectiveness of a promise made, out of natural love and affection, by one brother to another. Under the agreement, if the appellant was getting a salary of Rs. 400, he would have to pay the respondent Rs. 52-8-0 for his maintenance. By the time the appellant rose to a position in which he was able to earn Rs. 400, he was bound to have saved some money out of his prior earnings. In any event Rs. 52-8-0 out of Rs. 400 could not be regarded as unconscionable or inequitable to pay to the elder brother, who had enabled the younger brother to complete his education and secure a position in life. After 1958, the appellant is liable to pay only Rs. 15 a month so long as the respondent is alive. Even that sum is not payable if the appellant's income does not exceed Rs. 300 a month. The money is not necessarily to be paid out of the salary or income earned every month. The amount is determined with reference to the monthly income or salary.

Learned counsel for the appellant cited a case where relief was given on the ground that the bargain was unconscionable, viz., *Sundara Reddy* v. *Jagannathan*[1]. In that case, under a bond for Rs. 26 executed by a father and son in favour of a lender, the son undertook to discharge the interest on the amount by working at Rs. 2-8-0 a month. After getting a year's work from the son, the lender instituted a suit to recover the principal and Rs. 34 by way of interest. The District Munsif worked out the rate of interest at about Rs. 175 per annum. This Court held that the contract was unconscionable and that the lender had received adequate compensation for the money lent. The relationship between the appellant and the respondent was not at the time of the agreement and is not at present the relationship of a lender and borrower. There is no case for the application of section 74 of the Contract Act.

The appeal is dismissed. In view of the relationship of the parties, I direct them to bear their own costs in the Second Appeal.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATHIA PILLAI.

N. S. Vasudeva Iyer .. *Appellant.**

v.

Ramakrishna Iyer (minor) and others .. *Respondents.*

Kerala Agriculturists Debt Relief Act (*XXX of* 1958), *sections* 4, 5 *and* 6—*Construction and scope of—Scaling down of debts—Principles—Rate of interest at* 5 *per cent.—Applicability—Extent of.*

On a reading of sections 4, 5 and 6 of the Kerala Agriculturists Debt Relief Act the following principles emerge :

The rate of interest at 5 per cent. provided for in section 4 (2) of the Act would apply only in the calculation of interest on the principal debt outstanding at the commencement of the Act. As regards interest accrued due at the commencement of the Act not more than one-half of the principal would in any event be payable towards such interest. If, according to the contract rate, the amount of interest which has accrued due before the commencement of the Act is less than half the principal, then such interest would be payable. This is the general scheme of scaling down under sections 4 and 5. These provisions do not contemplate re-opening and re-appropriation in respect of the period before the commencement of the Act. The creditor would therefore be entitled to the principal debt outstanding at the commencement of the Act and an amount of not more than one-half of the principal towards interest till the commencement of the Act ; thereafter he would be entitled to interest at 5 per cent. on the principal debt outstanding at the commencement of the Act. The debt has to be scaled down in accordance with these principles.

1. A.I.R. 1927 Mad. 818.

* L.P.A. Nos. 79 and 95 of 1956. 6th November, 1958 (15th Kartika, 1880—Saka).

The total liability comprising principal, interest and, in the case of decrees, also costs, is repayable in 17 equal instalments (half-yearly) and on payment accordingly, the whole debt shall be deemed to be discharged.

Appeal under clause 15 of the Letters Patent against the Decree and Judgment of the Hon'ble Mr. Justice Panchapakesa Ayyar, dated 23rd March, 1956, in Appeal No. 735 of 1952, preferred against the Judgment of the Court of the Subordinate Judge of South Malabar at Palghat, dated 24th November, 1951, in O.S. No. 16 of 1945.

R. Gopalaswami Ayyangar, for Appellant.

C. S. Swaminathan, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The only question in these two appeals against the judgment of Panchapakesa Ayyar, J., by which he disposed of three appeals, A.S. Nos. 567, 734 and 735 of 1952, is how far the debts sued upon should be scaled down in accordance with the Kerala Agriculturists Debt Relief Act, 1958, which came into force during the pendency of the above appeals. The Act received the assent of the President on 5th July, 1958 and was published in the *Kerala Gazette* on 14th July, 1958. Under section 1 (3) of the Act "it shall come into force at once" and extend to the whole of the State of Kerala. These appeals arise out of two suits filed in the Court of the Subordinate Judge of South Malabar at Palghat for recovery of sums due under two mortgages. A.S. Nos. 567 and 734 of 1952 were from the decree and judgment in O.S. No. 46 of 1944 and A.S. No. 735 of 1952 was from O.S. No. 16 of 1945. L.P. Appeals No. 95 and 79 of 1956 relate to the above two suits respectively. In O.S. No. 46 of 1944, it may be mentioned, that the plaintiff for himself claimed only Rs. 3,000 as the principal debt ; but filed the suit also on behalf of defendants 4, 5, 6 and 7 to whom in the aggregate a sum of Rs. 3,000 was due as the principal debt. As the plaintiff had paid the Court-fees on the entire amount due, that is, not only for himself but also to defendants 4 to 7, he was awarded as part of the costs the entire Court-fee paid by him on the total amount claimed.

It is common ground that the Kerala Agriculturists Debt Relief Act, 1958, applies to the two debts which are the subject-matter of the two appeals. The material provisions of the Act are sections 4, 5 and 6. They run thus :

"*Section* 4.—**Payment of Debt in Instalments.**—(1) Subject to the provisions of sub-section (3), notwithstanding anything contained in any law or contract or in any decree or order of Court, any debt may be discharged in the manner specified in sub-section (2).

(2) If any debt is repaid in seventeen equal half-yearly instalments together with interest, secured due on the principal debt outstanding at the commencement of this Act till the date of payment of each instalment at the rate of 5 per cent. per annum or the contract rate whichever is less, the first instalment being payable before the expiry of a period of six months from the date of commencement of this Act and the remaining instalments being payable on or before the date of expiry of a period of six months from the last day on which the previous instalment was due, the whole debt shall be deemed to be discharged.

(3) The provisions of this section shall not apply to mortgages to which section 11 applies except as provided in sub-section (6) of that section.

Section 5. **Calculation of Interest in the case of debt.**—For determining the amount of a debt for the purposes of payment under this Act, notwithstanding anything contained in any law or contract or in any decree, or order of Court to the contrary, not more than one half of the principal shall be deemed payable towards interest which accrued due till the commencement of this Act.

Section 6.—**Application of Payment towards debt under section 4 and Limit of Time for Execution of Decree.**—(1) When any amount has been paid or recovered towards any debt referred to in section 4, the Court shall apply it in the order of costs due under the decree (where the debt was ripened into a decree); then, interest as recalculated under section 4 and next towards principal. (2) The provisions of section 4 shall, for purposes of execution, be deemed to be a subsequent order of Court within the meaning of the clause (*b*) of sub-section (i) of section 48 of the Code of Civil Procedure, 1908."

It will be observed that the scheme of scaling down under this Act is substantially different from the scheme found in the Madras Agriculturists Relief Acts

The above provisions relate to debts other than debts due under usufructuary mortgages mentioned in section 11 of the Act. On an analysis of the above three provisions, the following principles emerge :

(1) Whatever be the interest which had accrued due on the principal amount as per the contract rate, not more than one half of the principal shall be deemed payable towards interest with accrued due till the commencement of the Act.

(2) From the commencement of the Act interest shall be calculated at the rate of 5 per cent. per annum or the contract rate, whichever is less.

(3) The debt, which means according to the definition total liability comprising principal, interest, and in the case of decrees, also costs, is repayable in 17 equal half-yearly instalments and on payment accordingly the whole debt shall be deemed to be discharged.

(4) An amount paid or recovered towards any debt referred to in section 4 shall be applied in the following order : towards costs, if the debt is due under a decree and costs have been awarded, then interest as recalculated under section 4, and lastly, towards the principal.

The point in controversy before us was whether the rate of 5 per cent. would apply to any period before the commencement of the Act, if so, whether any amount paid or recovered before the commencement of the Act should be appropriated towards the debt thus scaled down. We must confess that the language is not so clear as one would wish in an enactment like this. But on a consideration of the relevant provisions of sections 4, 5 and 6, we are of the opinion that the rate of 5 per cent. applies only in the calculation of interest on the principal debt outstanding at the commencement of the Act. So far as the interest accrued due before the commencement of the Act, the only provision is that in no event will more than one half of the principal be deemed payable towards such interest. Of course, if according to the contract rate, the amount of interest which has accrued due before the commencement of the Act is less than half the principal, then such interest would be payable. This appears to be the general scheme of scaling down under sections 4 and 5. These sections do not contemplate re-opening and reappropriation in respect of the period before the commencement of the Act. Our construction is based entirely on the language of the sections as, obviously no authority could be available as regards the interpretation of these sections.

Applying these principles, it would follow that in these cases the creditor will be entitled to the principal debt outstanding at the commencement of the Act and an amount not more than one half of the principal towards interest till the date of the commencement of the Act. Thereafter the creditor will be entitled to interest at the rate of 5 per cent. on the principal debt outstanding at the commencement of the Act. There will be a scaling down of the debts in accordance with these principles.

There remains the question of costs. Before Mr. Panchapakesa Ayyar, J., Mr. C. S. Swaminathan, learned counsel for the creditors, represented that the plaintiffs were quite content to have costs calculated on the amounts due to the respective plaintiffs on the date of the Plaint, that is, the amount due as scaled down. We are also of the view that this would be the just and equitable order to be passed as regards costs. The plaintiffs will be entitled to their costs, calculated on the amount to which they would be entitled as per our directions above. There is however one detail which needs mention here. We have already pointed out that in O.S. No. 46 of 1944 the plaintiff paid Court-fee not only on the amount due to him individually but also on amounts due to defendants 4 to 7. Hence he was awarded the entire Court-fee. There was no appeal by defendants 4 to 7. The logical result of this would be that the order in favour of the plaintiff for recovery of costs including the Court-fee so far as these defendants are concerned, will remain untouched. As the plaintiff claimed in his own right the principal sum of Rs. 3,000

that is one half of the total principal of Rs. 6,000, we think that the justice of the case will be met by giving a decree to the plaintiff for half the Court-fee payable in respect of the claim of defendants 4 to 7, and proportionate Court-fee in respect of his own claim as directed above, that is, proportionately on the amount decreed to them.

The decrees passed by Panchapakesa Ayyar, J., in the two suits will be modified in accordance with our above judgment. The appellant will pay to the respondent Rs. 100 as Advocate's fee in each of the two appeals. As regards the other costs, there will be no order.

P.R.N. — *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Arumugha Goundar .. *Appellant**

v.

Palaniappa Goundar .. *Respondent.*

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), section 3 (2)—Construction—'Paid'—Meaning of—Tender—If equivalent to payment—Money sent to creditor by money-order—Refusal by creditor to receive—Effect—If payment to creditor within section 3 (2).

In order that the agriculturist debtor might avail himself of the benefits of section 3 (2) of Madras Act (I of 1955), there must be receipt of the money by the creditor or deposit of the money into Court. The debtor might make a deposit into Court. If such a deposit is made, the debtor becomes entitled to the benefits of section 3 (2). But if he does not make a deposit the only condition which would entitle him to the benefits of section 3 (2) is "payment", that is, receipt by the creditor of money tendered to him. The word "pay" is not the equivalent of "tender". Where money is sent by money-order through a post office, the post-office acts as the agent of the sender. Where the postman takes the cash with him and tenders it to the payee, there is no payment until the payee receives the money. If the payee refuses to receive the money tendered by the postman, the money cannot be said to have been "paid" within the meaning of the term in section 3 (2). The requirements of the word "paid" should not be cut down by considerations of expediency, or what may be regarded as the policy of the law.

Appeal against the Decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 33 of 1956 preferred against the Decree of the Court of the District Munsif of Palani in Original Suit No. 254 of 1955.

T. R. Ramachandran, for Appellant.

K. V. Srinivasa Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant agriculturist owed the plaintiff money on a promissory note. A suit on the promissory note would, but for Madras Act (I of 1955), be barred on the 29th June, 1955. Madras Act (I of 1955) which came into force on the 1st March, 1955, prohibited the institution of a suit for recovery of a debt from an agriculturist, during the months, March to June, 1955. That period of four months was excluded from the time prescribed by the Limitation Act for the institution of a suit for the recovery of the debt. The plaintiff had therefore to institute a suit against the defendant on 1st July, 1955, if no payments were made within that period of four months. The Act provides for payment of part of the debt within that period of four months and grants time, in the event of such payment, for payment of the balance of the debt in equal instalments. Section 3 (2) of the Act enacts:

"Where a creditor files a suit for the recovery of a debt during the period of four months from March to June inclusive, or after the agriculturist has paid or deposited into Court the sums and instalments specified as payable during the said period, the Court shall, in decreeing the suit, direct the plaintiff to bear his own costs and pay the costs of the defendant who is an agriculturist".

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* S.A. No. 715 of 1957. 11th September, 1959.
(20th Bhadra 1881—Saka.)

The defendant-appellant is an agriculturist.

The plaintiff sent the defendant a notice on 6th June, 1955, demanding the money. The defendant sent a reply on 17th June, 1955, stating that he was ready and willing to pay the amount payable in accordance with the provisions of Act I of 1955. The defendant did not pay any money. He sent Rs. 200 by money order on 29th June, 1955.

The defendant and the plaintiff live in the same hamlet called Akkaraipatti. In regard to money orders, the hamlet appears to be served by the post office at Narikkalpatti. The money order dated 29th June, 1955, was sent from the post-office at Narikkalpatti. The postman at the post office is entrusted with money payable on money orders in the event only of the money not exceeding Rs. 40. In other cases, he merely takes an intimation to the payee that a money order has been received and that the payee might go to the post office and take the money. The postman in this case took such an intimation to the plaintiff on 30th June, 1955. The intimation said that Rs. 200 had been received for payment to the plaintiff and that the plaintiff might go to the post office and receive the money. The plaintiff told the postman that he could not receive the money without consulting his lawyer at Palani. The plaintiff refused to receive the intimation. The plaintiff did not go to the post office but went to Palani. The money was returned by the postmaster to the defendant with an endorsement that the plaintiff had refused the money order.

On 1st July, 1955, the plaintiff instituted a suit for recovery of the money. The defendant contended that, since the sum payable under the Act before 1st July, 1955, had been paid by way of the money order which he had sent, he was entitled to his costs and that the plaintiff was not entitled to his costs. That plea was accepted by the District Munsif. He passed a decree for the amount due on the promissory note and directed the plaintiff to bear his own costs and to pay the costs of the defendant. The plaintiff preferred an appeal. The learned Subordinate Judge reversed the decree in the matter of costs and granted the plaintiff his costs in the suit and in the appeal. The defendant has preferred this second appeal. The question relates to the construction of the word "paid" occurring in section 3 (2) of Madras Act (I of 1955).

The word 'pay' is not the equivalent of the word 'tender'. In enacting that, in the absence of a deposit in Court, the plaintiff would be disentitled to his costs and would be liable to pay the defendant his costs if the money payable in accordance with the Act had been "paid", the Legislature clearly intended that controversies which might arise by the use of the word 'tender' should be obviated. If the word were 'tender', there would frequently be pleas in suits instituted for recovery of debts against agriculturists that the debtor had tendered the money and that the plaintiff had declined to receive the money and that, therefore, he was not entitled to his costs and was liable to pay the defendant his costs. That would involve the taking of evidence regarding tender and refusal with the possibility of conflicting findings on the questions of fact in the Court of first instance and in the Court of appeal. Desiring that such controversies should be avoided, the Legislature advisedly used the word "paid". There is no "payment" except where there is acceptance of the money tendered. To ensure to the agriculturist debtor an opportunity to avail himself of the benefit of section 3 (2), the Legislature provided the alternative of depositing the money into Court. The debtor need not make a tender and subject himself to the risk of refusal. The debtor might make a deposit into Court. If such a deposit is made, the defendant becomes entitled to the benefit of section 3 (2). But if he does not make a deposit the only condition which entitled him to the benefit of section 3 (2) is "payment", *i.e.*, receipt by the creditor of money tendered to him.

Where money is sent through a post office, the post office acts as the agent of the sender. In a case where a postman takes the cash with him and tenders it to the payee, there is no payment until the payee receives the money. If the payee refuses to receive the money tendered by the postman, the money cannot be said

to have been "paid" within the meaning of the word "paid" in section 3 (2). Even in cases where the money is sent through the post office, there may be controversies as to whether there was an actual tender by the postman and refusal by the payee. The money might be returned by the post office with an endorsement that it was refused. That would *prima facie* be evidence of refusal. But yet a creditor might contend that the endorsement was false, that there was no tender to him and that the endorsement of tender and refusal was fraudulently brought about by the debtor in collusion with the postman with a view to have the use of the money and avail himself of the provisions of section 3 (2). It is for reasons of that kind that the Legislature deliberately used the word "paid". The requirements of that expression should not be cut down by considerations of expediency or, what may be regarded as the policy of the law.

There may be a case of payment by cheque. Even in such a case, unless the cheque is received and cashed, there cannot be said to be a "payment". If the creditor finds a cheque in an envelope sent to him by the debtor and returns the cheque, there cannot be said to be a payment. The creditor is under no obligation to send the cheque to the bank concerned or to any person having an account in a bank so as to realise the money. Similarly, the creditor is under no obligation in a case like the present to go to the post office where, according to the intimation received or tendered to him, there is money which he might receive.

I find that, in order that the debtor might avail himself of the benefits of section 3 (2) of the Act, there must be receipt of the money by the creditor or deposit of the money into Court.

The judgment of the learned Subordinate Judge is correct. The appeal is dismissed with costs. No leave.

P.R.N. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT:—MR. JUSTICE RAMACHANDRA IYER.

Venkataswami Naidu .. *Petitioner**

v.

Nachimuthu Goundan and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), rules 2 and 4 relating to elections—Election petition without the required deposit—Not proper presentation—Delay in making the deposit—Effect.

Rule 2 of the Rules relating to elections under the Madras Village Panchayats Act prescribes a period of 15 days for the presentation of an election petition from the date of the declaration of the result of the election. An election petition under rule 4 was presented without the deposit of Rs. 25. The Election Commissioner returned the petition and gave a week's time for compliance with the necessary requirements. The petition was re-presented after the expiry of 14 days prescribed under the rule.

Held, rule 4 (1) on its terms is mandatory, and sub-rule (2) directs the Election Commissioner to dismiss a petition if it is not accompanied by the deposit of Rs. 25. The making of the deposit within the prescribed period is an essential condition for proper presentation.

It is not open to the Election Commissioner to give time for making the deposit beyond the period of time fixed by the rules.

The delay in making the deposit on the very day on which chalan was applied for was due to the default of the petitioner himself and not to any mistake on the part of the Election Commissioner or treasury officials.

Case-law discussed.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records in O.P. No. 30 of

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*W.P. Nos. 549 and 743 of 1959. 6th November, 1959.
(15th Kartika 1881—Saka).

1958 on the file of the Election Commissioner (District Munsif) of Tiruppur, and quash the order, dated 17th April, 1959, made therein.

R. Desikan, for Petitioner.

P. Sharfuddin, M. M. Krishnaswami Pillai, K. A. Basheer Ahmed, M. R. Krishnan and *S. M. Amjad Nainar*, for Respondents.

The Court made the following

ORDER.—These are petitions under Article 226 of the Constitution to call for records in O.P. No. 30 of 1958, on the file of the Election Commissioner (District Munsif), Tiruppur, and to quash the order, dated 17th April, 1959, therein.

The election to the Village Panchayat of Selakaraichal in Coimbatore District took place on 10th June, 1958. For Ward No. 4 three seats had to be filled up. Six persons filed their nominations for the three seats, amongst whom the petitioners in the two petitions were contesting candidates. There were four more candidates who filed their nominations. But the Election Officer rejected the nomination papers of those four persons, as not being proper, with the result, that for the three seats for which there had to be an election, there were only two candidates, namely, Venkataswami Naidu and Rangaswami Naidu. The Election Officer, therefore, declared both of them to be duly elected, holding the other seat was vacant. This declaration was made on 9th June, 1958. The four persons, whose nominations were rejected, presented a petition to the Election Commissioner challenging the election of the returned candidates on various grounds. The petition was presented on 18th June, 1958. The petition was, however, filed without the deposit of Rs. 25 which had to be made in respect of each of the candidates whose election was challenged under the provisions of rule 4 (1) of the Rules relating to the decision of Election Disputes. Even the lodgment schedule form which accompanied the petition was not signed by the advocate presenting the petition. The petition was returned on the same date, the Election Commissioner stating "Returned. Time one week." The petition was re-presented on 25th June, 1958. A chalan was then issued to the petitioner's advocate, and a sum of Rs. 50 was paid on the same date. The election of the returned candidates was challenged on the grounds (1) that there was no due publication of the date of the election, and (2) that the returned candidates were not qualified to stand, they having been defaulters in respect of the taxes payable to the Panchayat. The successful candidates took a preliminary objection to the maintainability of the petition on the ground that the petition was not presented in time, and that, it was liable to be dismissed. The Election Commissioner held that there was no merit in the case of the election petitioners, that there was no due publication of the notice relating to the election. He, however, held that the successful candidates were defaulters. As regards the objection of the returned candidates, that the election petition was not filed in time, the Commissioner held that, as the amount of Rs. 50 was paid within the time granted by his order, dated 18th June, 1958, there was no delay in the presentation of the petition. On those findings, the Election Commissioner set aside the election, and directed a fresh election. The successful candidates have filed the above writ petitions, challenging the propriety of the order of the Election Commissioner.

The only question argued before me was as to whether the election petition had been presented in time. To appreciate that contention, it is necessary to refer to rule 4 of the Rules relating to decision of election disputes. That Rule states :

"4. (1) At the time of presentation of the petition, the petitioner shall deposit with it in cash twenty-five rupees as security for the costs of the same.

Explanation.—Where the election of more than one returned candidate is called in question, a separate deposit shall be made in respect of each such returned candidate.

(2) If the provisions of sub-rule (1) are not complied with, the Election Commissioner shall dismiss the petition.

(3) Upon compliance with the provisions of sub-rule (1), the Election Commissioner shall proceed to inquire into the petition."

Rule 2 of the Rules prescribes a period of 15 days for the presentation of an election petition from the date of the declaration of the result of the election. In the present case declaration of the result of the election was made on 9th June, 1958. A petition, challenging the election, could be filed within 15 days thereafter, that is, by 24th June, 1958. As stated already, the petition was actually filed on 18th June, 1958. But then the petition was not accompanied with a deposit of Rs. 50 under rule 4 (1). The petition was not re-presented within 24th June, 1958, after complying with the requirements of rule 4; it was re-presented only a day later. Under the circumstancess, a question will arise as to whether there has been proper presentation of the petition within the terms of rule 2. That would depend upon the answer to the question, whether the provision of rule 4 (1) is mandatory, so as to render invalid any petition presented without complying with the provision as to deposit of cost. Rule 4 (1) on its terms is mandatory. Indeed, sub-rule (2) directs the Election Commissioner to dismiss a petition, if it is not accompanied by the deposit. Under the circumstances, it was not open to the Election Commissioner to give time for making deposit beyond the period of time, within which the election petition could be presented. In the present case, the Election Commissioner could have granted time till 24th June, 1958, to the election petitioners for complying with the mandatory provision of rule 4 (1) as the election petition would be in time if presented on that date. Mr. Sharfuddin, the learned advocate for the respondents contended that notwithstanding the provision of rule 4, the Election Commissioner would have jurisdiction to grant such time as he may deem just for making the deposit and he referred me, in this connection, to the decision in *Gopalakrishna Pillai* v. *Kunjithapatham Pillai*[1]. In that case, a petition was filed to set aside an election of a Member of a Taluk Board held on the 9th of May, 1922. The petition was filed on the 17th July, 1922, immediately after the Court re-opened after summer recess. The petitioner brought the money required to be deposited in Court, along with the application, and applied for a chalan to pay it into the Bank, as required by the Civil Rules of Practice. The money could not be paid into the Bank on that date, owing to the absence of the Treasury Officer. It could not be paid on the forenoon of the next day, owing to an accident sustained by the petitioner with the result that it had to be paid only on the next day. An objection was taken to the maintainability of the petition on the ground that the petition was not accompanied with the deposit, as prescribed by the Rules. The learned Judges held that the delay in the payment of the money in that case was not due to any negligence of the party but to the act of Court, and applying the principle that no party should be prejudiced by the acts of Court or its Officers, it was held that there was no delay. This decision was considered by Wadsworth, J., in *Sankaran Nayar* v. *Govindan Nayar*[2], where the learned Judge held that a deposit required to be made under the statutory provision could be deemed to have been made on the day on which chalan was applied for, only if it was proved that the applicant was prevented from making the deposit on the very day on which chalan was applied for by some default on the part of the Treasury Officer, or the Bank, or by some delay on the part of the Court in issuing the chalan, so as to prevent the applicant from making the deposit in time. Those decisions will, however, have no application to the present case, where the delay in making the deposit on the very day on which chalan was applied for was due to default of the petitioner himself, and not to any mistake on the part of the Court or its Officers. There is, a decision of the Orissa High Court in *Jagannath* v. *Rama Chandra*[3], in a similar case under the Representation of the People Act. The Representation of the People Act contained a provision for payment of deposit as security in respect of costs of the petition similar to the one contained in rule 4. In that case, the treasury receipt did not accompany the election petition which was sent by post. But, on the same day, the election peritioner sent another packet to the Election Commissioner, containing treasury receipt and copies of the election petition. The first packet containing the original petition reached the Election Commissioner on the 22nd April, 1957. But the other

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1. (1923) 45 M.L.J. 849 : I.L.R. 47 Mad. 543.
2. (1942) 1 M.L.J. 573.
3. A.I.R. 1959 Orissa 26.

packet containing the treasury receipt, although sent by Air Mail (express delivery), reached the Election Commissioner four days after the time had expired. It was held that there was no valid presentation of the petition within the time prescribed by law, and that it should be dismissed. It is, however, unnecessarily to consider whether that decision is in conformity with the principle laid down in the two Madras cases where the party could not make deposit in time, owing to the mistake of the Court or its Officers and the treasury receipt not reaching the Election Commissioner in time. In the present case, there is a default on the part of the election petitioner to make the deposit within the time prescribed by the law and the default could not be attributed either to the Election Commissioner or to the Treasury Officials. There was thus a non-compliance with the mandatory provision of rule 4 (1). The making of deposit within the time prescribed being an essential condition for proper presentation of an election petition, it should be held that there was no valid presentation of the petition in the present case within the time prescribed by rule 2, *viz.*, 24th of June, 1958. The petition, presented on 25th June, 1958, was out of time, and, therefore, would not be maintainable. The Election Commissioner had, therefore, no jurisdiction to deal with the petition which should be dismissed.

Rule *nisi* is made absolute. In the circumstances of the case, there will be no order as to costs.

V.S. — *Rule* nisi *made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

V. D. Kothandapani Mudaliar .. *Petitioner.**

v.

The Area Committee, H.R. and C.E. for Madras City and Chingleput District, Madras, by its President, Assistant Commissioner, H.R. & C.E. and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 39 (2) *and* 41 (1)—*Appointment of non-hereditary trustee to a temple having hereditary trustees—Conditions.*

The combined effect of sections 39 (2) and 41 (1) of the Madras Hindu Religious and Charitable Endowments Act is where there is a hereditary trustee for a religious institution, the statute requires (1) that notice should be given to such trustee before any step is taken, (2) that such enquiry as is deemed necessary should be held before non-hereditary trustees are appointed, (3) that reasons should be recorded for the appointment to be made, and (4) that the reason should be that the affairs of the institution are not and are not likely to be properly managed by the hereditary trustee or trustees.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the Area Committee for Hindu Religious and Charitable Endowments for Madras City and Chingleput district, the first respondent herein, relating to Resolution No. 7, dated 26th August, 1957, appointing respondents 2 and 3 as trustees and to quash the said resolution.

T. A. Ramaswamy Reddy, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), *T. R. Mani,* for *V. Seshadri* and *K. S. Ramamurthi,* for Respondents.

The Court made the following

ORDER.—The order impugned in this petition for the issue of a writ of *certiorari* is that of the Area Committee, Madras City and Chingleput District. The temple in question is the Elavapuriswarar temple situated at Vilangadupakkam village in Saidapet Taluk. The petitioner was hereditary trustee of this temple. It is stated that complaints were received about the maladministration of the temple and its affairs by the petitioner, and a notice was issued to him on 5th August, 1957,

* W.P. No. 89 of 1958. 1st October, 1959.
(9th Asvina, 1881—Saka.)

by which the petitioner was called on to show cause why non-hereditary trustees should not be appointed for the proper management of the temple. The petitioner showed cause and submitted his explanation. Thereafter the Area Committee passed on 26th August, 1957, a resolution appointing respondents 2 and 3 as the non-hereditary trustees of this institution. It is the validity of this resolution and this order of appointment of non-hereditary trustees that is challenged in this petition.

To appreciate the contention urged on behalf of the petitioner, it is necessary to advert to the relevant statutory provision bearing upon the appointment of non-hereditary trustees by Area Committee. Section 41 (1) of Madras Act (XIX of 1951) enacts, (to quote only the relevant portion):

"41. (1) In the case of any religious institution over which an Area Committee has jurisdiction, the Area Committee shall have the same power to appoint trustees as is vested in the Commissioner in the case of a religious institution referred to in section 39".

The relevant portion of section 39 to which reference is made herein is section 39 (2) which runs :

"(2) Where, in the case of any such institution having a hereditary trustee or trustees, the Commissioner, after notice to such trustee or trustees and after such inquiry as he deems adequate, considers for reasons to be recorded, that the affairs of the institution are not, and are not likely to be, properly managed by the hereditary trustee or trustees, the Commissioner may, by order, appoint such number of non-hereditary trustees as he thinks necessary, so however that the total number of trustees does not exceed five."

The combined effect of these two sections 39 (2) and 41 (1), would be that where there is a hereditary trustee, the statute requires: (1) that notice should be given to such trustee before any step is taken; (2) that such enquiry as the Commissioner or the Area Committee as the case may be deems or deem adequate should be held before non-hereditary trustees are appointed ; (3) that reasons should be recorded for the appointment to be made and (4) that the reason should be that the affairs of the institution are not, and are not likely to, be properly managed by the hereditary trustee or trustees.

In this case it would be seen that a notice was issued to the petitioner as the hereditary trustee of this institution before action was taken for the appointment of the non-hereditary trustees and so the first condition was satisfied. The complaint, however, of the petitioner was that there was a failure on the part of the Area Committee to conform to the statute in respect of the other two matters : (1) that there was no inquiry held into the matters set out in his explanation to what amounted practically to charges of mismanagement against him, and (2) that the order actually passed making the appointments did not contain the record of any reasons, which was a statutory pre-requisite of a valid order.

I shall take these two objections in that order. First as to the enquiry ; I called for the minutes book of the Area Committee for having the point cleared. The meeting of the Area Committee at which the resolution now impugned was passed was held on 26th August, 1957, the previous meeting having been on 25th July, 1957. The notice of the Assistant Commissioner to the petitioner was to show cause why non-hereditary trustees should not be appointed in view of certain items of mismanagement set out in his memorandum, dated 5th July, 1957. The reply of the petitioner together with the explanation was submitted on 14th August, 1957 and the resolution for the appointment was, as already stated, passed on 26th August, 1957 and it was item No. 7 on the agenda of the meeting on that date. The office file of the Assistant Commissioner shows that on 17th August, 1957, he had as the Assistant Commissioner passsed an order stating that the explanation of the hereditary trustee was not satisfactory and made a decision that respondents 2 and 3, might be appointed non-hereditary trustees. On the same day he made a note in the file approving the agenda for the meeting. The agenda merely ran

"Trustees—Sri Elavapuriswarar Temple, Vilangadupakkam village, Saidapet Taluk, Chingleput District—Appointment—Consideration of",

and on 26th August, 1957, respondents 2 and 3 were appointed as non-hereditary trustees. In the face of this state of the file and of the minutes book,

one is at a loss to understand as to when the Area Committee considered whether an inquiry was needed or what sort of inquiry was adequate in terms of section 39 (2) which is made applicable to the Area Committee under section 41 (1). If the Area Committee had before it the explanation and after considering the explanation felt that on the matters set out in the charge and in the explanation no inquiry was needed, that would raise a different question for consideration. That is not, however, what happended in the present case. The only person who appears from the files to have considered the explanation of the petitioner was the Assistant Commissioner. Certainly he was not the Area Committee though from the files, read with the minutes book it looks as if the Assistant Commissioner was constituted the Area Committee. I therefore hold that the statutory requirement that the Area Committee should consider this question as to the need for an inquiry and the extent or manner has not taken place in the present case. It is therefore not surprising that no reasons were recorded for the resolution by the Area Committee because they had none themselves. The Assistant Commissioner evidently might have had some reasons but that is not the same thing as the requirement that the Area Committee should for reasons to be recorded consider the appointment necessary.

I hold therefore that there has been a violation of the statutory conditions, subject to which alone an appointment of a non-hereditary trustee might be made to the prejudice of a hereditary trustee, and in the circumstances the order of appointment of respondents 2 and 3 to the office of the trustee cannot stand. The petition succeeds and the rule *nisi* is made absolute. The order of the Assistant Commissioner and the resolution of the Area Committee is set aside. There will be no order as to costs.

K.S. — *Rule* nisi *made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

C. K. N. S. Nagarajan .. *Petitioner.**

v.

The State of Madras (by Secretary, Revenue Department) and others .. *Respondents.*

Madras Sugar Factories Control Act (XX of 1949) and Madras General Sales Tax Act (IX of 1939), section 2 (i), Proviso—Sale of sugar-cane grown in the lands benami—Exemption under the proviso—'Dealer'—Madras General Sales Tax Rules, rule 17—Re-assessment of escaped turnover—Limitation.

The petitioners sold to the Factory the sugar-cane grown in the (1) lands owned by them; (2) lands held on lease by them and (3) lands the produce of which was sold benami. As regards assessment to sales-tax in regard to the sale of sugar-cane grown in the lands not proved to have been held on lease and the lands in the third category exemption to tax can be claimed under proviso to section 2 (i) of Act IX of 1939.

Held, The proviso to section 2 (i) provides that the proceeds of sale by a person of agricultural produce grown on any land in which he has an interest should be excluded from the turnover. Obviously the exemption for which the proviso provides comes into play only if the sales are otherwise taxable. The taxability of the sales depends on the question whether the sales were by a 'dealer' as defined by the Act.

As regards the sale of sugar-cane grown in the lands not proved to have been leased to the petitioners and lands in the third category, the owners of the lands might have sold the sugar-cane to the Factory in the name of the petitioners, or directly by the owners, or by the petitioners as the agents of the owners. The petitions have to be remanded to decide the above questions, and to find out whether the petitioners are 'dealers' as defined by the Act.

Under rule 17 the assessing authority can assess a turnover, if it escapes assessment, within the year of assessment itself, or within two years next succeeding that to which the tax related. In effect the rules prescribed the latter period as the limit within which the assessing authority should take proceedings for assessing the escaped turnover.

Petition under section 12-B of the Madras General Sales Tax Act praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated

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* T.R.Cs. Nos. 196, 198, 209 and 210 of 1956. 23rd September, 1959. (2nd Asvina, 1881—Saka.)

17th April, 1956 and made in T.A. Nos. 1308, 1317, 1197 and 1307 of 1955 preferred respectively against the Orders of the Commercial Tax Officer, South Arcot, Cuddalore, dated 14th August, 1955, 30th June, 1955 and 14th August, 1955 and made respectively in Appeals Nos. 67 of 1955-56, 66 of 1955-56, 60 of 1955-56 and 68 of 1955-56 (A. 2. 2589/51-52 ; A. 2. 2675/51-52 ; A. 2. 7400/51-52 and A. 2. 2418/51-52 on the file of D.C.T.O., Villupuram).

V. Tyagarajan, A. R. Krishnaswami and *M. A. Rajagopalan*, for Petitioner.

The Government Pleader (*K. Veeraswami*) on behalf of the Respondent in all the petitions.

The Order of the Court was made by

Ramachandra Iyer, J.—For the assessment year 1952-53 each of the petitioners was assessed to sales-tax on the turnover of the sales of sugar-cane effected by him to the East India Distilleries and Sugar Factories Limited, Nellikuppam, hereinafter referred to as the Factory. In the case of two of the petitioners (T.R.C. Nos. 196 and 210 of 1956), it was a case of re-assessment by recourse to rule 17 of the General Sales Tax Rules, after the original assessment on them had been completed. Since the questions that arise for determination in these petitions are identical they can be disposed of together by a common order.

Supplies of sugar-cane to sugar factories are regulated by the Madras Sugar Factories Control Act (Act XX of 1949). The factory has to take out a licence for crushing sugar-cane. After ascertaining the quantity of sugar-cane that would be required for such a factory, the authorities notify an area as reserved area for that factory for the crushing season. Under section 10 of the Act, before each planting season, any grower of sugar-cane in the reserved area may offer such quantity as he may specify of the sugar-cane grown by him to the factory in the crushing season immediately following it. The factory then enters into an agreement with the registered grower for purchasing the sugar-cane offered by him. Section 11 of the Act prohibits the sale of sugar-cane grown in the reserved area to a person other than the factory specified, unless the factory, has refused to buy the sugar-cane. No one is permitted to export any sugar-cane out of the reserved area except where the sale of the sugar-cane to a person other than the factory is permitted. The factory generally enters into an agreement with a registered grower, allotting a particular acreage of land to him and undertaking to purchase the sugar-cane grown on the lands so specified. The petitioners were all registered suppliers to the Factory at Nellikuppam. It was common ground that the books of the factory showed the correct amount for which the sugar-cane was sold in the year in question by the petitioners.

The petitioners contended that they were not liable to be assessed to sales-tax on the sales of sugar-cane because such sales did not fall within the scope of "turnover" within the meaning of section 2 (i) of the Madras General Sales Tax Act (IX of 1939).

Section 2 (i), as it stood in the relevant year, ran :

"'Turnover' means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufrucutary mortgagee, tenant or otherwise, shall be excluded from his turnover."

In the proceedings before the departmental authorities and before the Tribunal the substantial plea of the petitioners was that the sales of the sugar-cane in question came within the scope of the proviso to section 2 (i) of the Act, that is, that the sugar-cane was grown on lands in which the petitioners had an interest as defined by section 2 (i) of the Act.

In the proceedings before us a further plea had been taken, that quite independent of the question, whether the proviso to section 2 (i) of the Act applied, none of the petitioners was a dealer at all as defined by the Act, and therefore the sale effected by the petitioners fell outside the scope of the definition of "turnover".

Admittedly, the petitioners were not the owners of all the lands in respect of which they were registered in the books of the Factory as growers of sugar-cane. According to the petitioners the lands registered in their names in the books of the Factory on which sugar-cane was grown which sugar-cane was subsequently sold to the Factory fell into three categories (1) lands owned by the petitioners, (2) lands held on lease by the petitioners, and (3) lands the produce of which was sold benami. What precisely the petitioners meant by the expression 'benami' is not clear. It was not their case that the ostensible title to those lands vested in the petitioners the real title being with somebody else. Indeed the petitioners admitted that they had no possession of the lands that were included in the third category mentioned above. What the petitioners claimed was that they were allowed to register in their own names with the Factory these lands though the owners themselves raised the sugar-cane on those lands. It was the owners that raised the sugar-cane that supplied sugar-cane to the Factory but the supply was in the names of the petitioners as registered growers. It was those owners however, that obtained the sale price for the sale of that sugar-cane. This was evidently done with a view to obtain the comparatively high price which the Factory paid to the registered growers of sugar-cane. Whether such benami sales were in contravention of the provisions of Madras Sugar Factories Control Act is not really germane to the present proceedings, where the question for determination is whether the proceeds of such sales of sugar-cane were liable to be included in the assessable turnover, if any, of the petitioners. There was no difficulty at any time about the sales of the sugar-cane grown on the lands included in the first of the three categories mentioned above, that is sugar-cane grown on lands owned by the petitioners. The departmental authorities held that such sales came within the scope of the exemption, for which the proviso to section 2 (i) provided. The Deputy Commercial Tax Officer, however, did not accept the assessees' case in its entirety with reference to the lands included in the second category, that is, the lands leased to the petitioners. The plea of lease was accepted only in respect of a portion of the extent, and that finding was ultimately confirmed by the Tribunal. With reference to the sale of sugar-cane grown on lands proved to have been held on leases by the petitioners exemption was granted under the proviso to section 2 (i), and, that is no longer in issue. With reference to the other lands in the second category, that is, lands which the petitioners failed to prove had been leased to them, and, with reference to the sales in the third category, which can be comprehensively referred to as benami sales, the departmental authorities were of the view that the sales of sugar-cane by the petitioners did not come within the scope of the proviso to section 2 (i), as the petitioners had no interest in the lands on which that sugar-cane was grown. That view was confirmed by the Tribunal.

We have already referred to the fact that in the case of two of the petitioners (T.R.C. Nos. 196 and 210 of 1956), they were re-assessed on the sales of sugar-cane under rule 17 of the General Sales Tax Rules on the ground that this turnover had escaped assessment in the original assessment for 1952-53. Mr. Tyagarajan, the learned advocate for the petitioners, contended that that re-assessment was not valid as the re-assessment undertaken after the notice issued on 18th March, 1955, was barred by limitation. Rule 17 (1) provided that the assessing authority

"may at any time, within the year or the two years next succeeding to which the tax or licence fee relates, determine the turnover which has escaped assessment."

It is not disputed that if the latter period, that is the two years period applied, the proceedings would have been properly initiated. Learned counsel, however, contended that on a proper construction of rule 17 it should be held that it prescribed two periods of limitation, and that in such a case the tax payer would be entitled to the benefit of the shorter of the two periods : the further plea was that the proceedings initiated beyond the year of assessment were barred by limitation. We are unable however to accept this interpretation of the scope of rule 17. Under the rule the assessing authority can assess a turnover, if it escapes assessment,

within the year of assessment itself or within two years next succeeding that to which the tax related. In effect, the rule prescribed the latter period as the limit within which the assessing authority should take proceedings for assessing the escaped turnover. The former time limit was mentioned apparently only to emphasise the power of the assessing authority to take re-assessment proceedings even during the year of assessment itself, when that authority came to know of the escape of assessment after an assessment had been completed under section 9. In the present case notice under rule 17 was issued within two years following the year of assessment. The proceedings were validly initiated and completed.

The question we have to determine now is, whether the sales of sugar-cane to the Factory fell within the scope of the definition of "turnover", and whether each of the petitioners was liable to be assessed to sales-tax on that turnover. That question is really limited to the sales of sugar-cane grown on lands in which, the Tribunal held, the petitioners had no interest, that is, a portion of the lands in category (2) and the lands in category (3) of the three categories mentioned above.

The learned counsel for the petitioners contended that the entire claim of the assessees under category (2) should have been allowed and that all the leases pleaded by them should have been accepted by the Tribunal as true. We were taken through the evidence in this case. Apart from the fact, that the finding of the Tribunal on this question being one on a question of fact, and, that this Court should not normally interfere with such a finding, we are of opinion that the finding of the Tribunal was fully justified by the evidence. It was for the petitioners to prove each of the leases pleaded by them and with reference to the claim disallowed, they failed to prove those leases.

Before the departmental authorities and before the Tribunal the endeavour of the assessees-petitioners was that each of them was entitled to the exemption for which section 2 (i) provided. As we pointed out earlier, before us an additional ground was taken, that none of the petitioners was a dealer with reference to the sugar-cane sold by him or in his name to the Factory, and that therefore there was no liability to be assessed to sales-tax. This question, whether with reference to those sales of sugar-cane any of the petitioners was a dealer, even the Tribunal had no occasion to consider and decide.

Obviously the exemption for which the proviso to section 2 (i) provides comes into play only if the sales are otherwise taxable. The taxability of the sales depends on the question, whether the sales were by a dealer as defined by the Act. A sale even of agricultural or horticultural produce but with nothing more is not enough to establish that the seller is a "dealer".

With reference to the sales of sugar-cane grown on lands owned by the petitioners and on lands proved by the petitioners to have been leased by them, they were not charged to sales-tax. It was immaterial to them whether that was on the ground that they were not dealers or on the ground that, though they were dealers, the sales came within the scope of the exemption for which the proviso to section 2 (i) provided. It is with reference to the other sales that the question becomes relevant, whether the petitioners or any of them were dealers at all. If they were dealers, then the turnover would be liable to tax because, in the absence of proof, that they had an interest in the lands as specified by section 2 (i), none of the petitioners can claim the benefit of that exemption.

In deciding this question, it should be obvious that the two categories of lands stand practically on the same footing, that is, lands which the petitioners failed to prove had been leased to them, and lands which admittedly were never in the possession of the petitioners, the produce of which, however, was sold benami by the owners in the name of the petitioners. In neither case could the petitioners claim to have been in possession of the lands though the produce of those lands was sold in the name of the petitioners because they had been registered as the growers

of sugar-cane on those lands. Having regard to the provisions of section 11 of the Madras Sugar Factories Control Act (XX of 1949) it would be difficulty to assume that the owners of those lands, who were the persons entitled to possession of those lands, and who actually grew the sugar-cane would have sold the sugar-cane to the petitioners. But such a possibility cannot be excluded. The sugar-cane grown on such lands might have been delivered by the respective growers to the Factory, utilising the names of the registered growers, that is the petitioners, or it might have been a case of the sale of the sugar-cane to the Factory by the petitioners as the agents of the persons who grew the sugar-cane. The Tribunal held that in respect of these transactions the petitioners must have obtained some monetary advantage. The mere gaining of a monetary advantage would not by itself and with nothing more make the petitioners dealers in respect of the sales of sugar-cane grown by others and sold in the name of the petitioners. We have already pointed out that sales of even agricultural produce with nothing more may not be enough to establish that the seller was a dealer as defined by the Act. What is taxable is the turnover of sales by a dealer and not every sale as such. Merely as an illustrative example we may point out that the petitioners could be held to be dealers if they bought the sugar-cane from the growers and subsequently sold it to the Factory, or, if the petitioners acted as agents of the growers, which agency itself was part of the business of the petitioners as dealers. As we pointed out earlier, the question, whether with reference to these sales the petitioners were dealers at all, was not presented for adjudication at the earlier stages and the Tribunal had no occasion to go into it. As, however, the legality of the levy of the tax depends also on the decision of the question, whether each of the petitioners was a dealer with reference to his sales of sugar-cane to this Factory, we consider that, though this question was not raised in this form at any stage before, it is necessary to have that question determined before the liability imposed on the petitioners is either affirmed or set aside. As the point was not raised before, it may be necessary to take further evidence on the question, whether the petitioners or any of them was a dealer. In these circumstances, we consider it proper to set aside the orders of the Tribunal and remand the appeals for consideration afresh of the questions at issue. In doing so, we would like to make it clear that we accept the finding of the Tribunal in regard to the extent of the lands owned by the petitioners and that of the lands proved to have been leased to them. The price of sugar-cane grown on those lands was excluded from the turnover of the petitioners held to be assessable. The remand is thus confined to the consideration of the question of the assessability of the sale price of sugar-cane grown on the other two classes of lands, that is the lands which the petitioners failed to prove had been leased to them and the lands the produce of which the petitioners claim had been sold by the growers benami, that is, in the name of the petitioners.

The Tribunal will give further opportunities both to the petitioners and to the State to let in further evidence to decide the questions at issue, mainly, the question whether each of the petitioners was a 'dealer' as defined by the Act.

The petitions are allowed to the extent indicated above. There will however be no order as to costs.

V.S. *Petition allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

A. Bhaskaran and another .. *Petitioners**

v.

Sellappa Goundan and others .. *Respondents.*

Madras Estates (Supplementary) Act (XXX of 1956), sections 3, 10 and 11—Whether a non-ryotwari area is an 'estate' or not—Scope of the jurisdiction of the civil Court and the Tribunal under the Act—Application by a person interested—What constitutes.

Interepretation of Statutes—General words in statutes—Principles of construction.

It is evident from the provisions of the Act that the jurisdiction to decide whether a non-ryotwari area is an estate or part of an estate was for the purposes of the Rent Reduction Act (XXX of 1947) and the Abolition Act (XXVI of 1948). Having regard also to the fact that the Tribunals under the Act are temporary ones created by statute for the proper working of the two enactments referred to above and that they were not intended as a substitute to the ordinary Courts of the land, their jurisdiction should be limited to cases where the sole question is whether an area is an estate or not for the purposes of the two enactments.

Section 10 should not be understood as prohibiting the ordinary civil or renevene Courts or other Tribunals from deciding that question incidentally if that were necessary for the purpose of exercising their jurisdiction.

The provisions of the Act cannot have any application to suits in civil Courts in respect of rights other than those created by Act XXX of 1947 and Act XXVI of 1948.

The substance of the claim of the plaintiff should be looked into for the purpose of jurisdiction.

Section 11 would relate to only those proceedings which if initiated after the Act could be done under section 3, that is, a proceeding at the instance of a person interested. If the defendant is only a tenant under a terminable lease he would not be a person who would be interested in the question whether the suit land was situate in an estate or not.

The general words of a statute have to be interpreted in the light of the other provision of the Act.

In order to properly interpret any statute and arrive at its real meaning it is necessary to consider what the law was previously, what was the mischief or defect for which the law had not provided, what remedy the Legislature has appointed and the reason for the remedy.

Heydon's Case, 76 Eng. Reports 637 and *Macmillan & Co. v. Dent*, L.R. (1907) 1 Ch. 107, referred.

Petition under section 115 of Act V of 1908 and Article 227 of the Constitution of India praying the High Court to revise the Order of the Court of the District Munsif of Sankaridrug at Salem, dated 11th December, 1957 and made in I.A. No. 2434 of 1957 in O.S. No. 67 of 1955.

V. Vedantachari, for Petitioners.

T. K. Subramania Pillai, for Respondents.

The Court delivered the following

JUDGMENT.—This Revision Petition is filed against the order of the District Munsif, Sankaridrug at Salem, transferring the records in O.S. No. 67 of 1957 on his file to the Estates Land Act Tribunal, Vellore, under section 11 of Madras Act (XXX of 1956). The plaintiffs are the petitioners. O.S. No. 67 of 1957 was filed for ejectment of and recovery of mesne profits from the defendants. The plaintiffs claimed that the suit properties belonged to them absolutely, that they granted a lease of the same in the year 1949 to the first defendant (defendants 2 to 4 being his sons), and that the aforesaid lease was renewed thereafter. The renewed lease is stated to have terminated on 12th April, 1953 and as the defendants refused to hand over possession, the suit was filed for recovery of possession and mesne profits.

The defendants contested the suit. They denied the plaintiffs' title to the property and also the lease. They further stated that the suit properties were

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* C.R.P. No. 168 of 1958. 1st October, 1958. (19th Asvina, 1880—Saka.)

ryoti lands in the whole inam village of Komarapalayam Agraharam, in which they have the kudivaram interest from the time of their ancestors, and that the plaintiffs being only the landholders could not evict them. Various issues were framed in the suit. For the present purpose Issues 7 to 9 are alone relevant. They are :—

7. Is Komarapalayam Agraharam village not an estate as defined in the Madras Estates Land Act (I of 1908) as amended ?

8. Are the suit lands ryoti lands ?

9. Whether the defendants 2 to 4 have occupancy or kudivaram rights in the suit lands ?

The defendants, thereafter, filed I.A. No. 2434 of 1957 in the lower Court for transferring the suit under section 11 of Madras Act (XXX of 1956). The lower Court held that as it was incumbent on the Court to decide whether the suit lands are situate in an estate or not, the suit should be transferred to the Tribunal. The plaintiffs have filed the present Revision Petition against that order.

The plaintiffs' case is that the village, in which the land is situate, is not an estate, and even if it were so, they had the full right, that is, both the melwaram and kudivaram interests in the suit property which would entitle them to evict the defendants. On the other hand, the defendants claim to have occupancy rights in the lands, as the village according to them is an estate and the suit lands ryoti. On an analysis of the contention, it would follow that (1) if the village is an estate and the suit lands are ryoti lands, the suit would have to be dismissed, as the civil Court will have no jurisdiction to entertain the suit, (2) if the village is an estate but the suit lands are not ryoti lands but those in which the plaintiffs have both melwaram and kudivaram interests or at least kudivaram interest in the lands, the suit will have to succeed and that (3) if the village is not an estate at all, and the defendants' right was only under the lease granted by the plaintiffs, which subsequently came to an end, a decree for possession should follow. Therefore, the right of the defendants to retain possession would depend not only on the fact of the village being an estate but on the suit lands being ryoti lands in which they have an occupancy right. It is true that in order to prove that the lands are ryoti lands it should first be shown that the village in which they are situate is an estate. But that is only preliminary or incidental step to ascertain whether the lands are ryoti lands. The contention on behalf of the defendants is that under section 11 of Madras Act (XXX of 1956) the Court has no option but to transfer the suit to the Tribunal once there is an issue in the case involving the determination as to whether any area is situate in an estate, regardless of the fact whether such issue is necessary or merely incidental to the case. It may be noticed that Issues 8 and 9 cannot come within section 11 of the Estates Land Act. The only issue on which the defendants could rely is Issue No. 7 under which it has got to be decided whether the suit village is an estate or not. Before considering the contention raised on behalf of the parties, it is necessary to set out section 11 (1) of Madras Act (XXX of 1956):

"All suits, appeals or other proceedings (other than those proceedings before the High Court) pending at the commencement of this Act before any Court or Tribunal or Settlement Officer as denfied in section 2, clause (13), of the Abolition Act, in which any question is in issue whether a particular area is or was an estate as defined in section 3, clause (2), of the Estates Land Act, or is or was an inam estate as defined in section 2, clause (7) of the Abolition Act, shall stand transferred to the appropriate Tribunal constituted under this Act for the determination of that question."

The terms of the section are, no doubt, wide. But in my view, it cannot be read so as to justify a transfer of suits to the Tribunal in which the determination of the question referred to in the section is only incidental to the granting of reliefs, which could be granted by the civil Court. I am also of opinion that there would be no bar to the entertainment of the suit by the civil Court if the issue as to whether a particular non-ryotwari village is an estate or not is unnecessary for the determination of the suit.

There is no provision either in Act XXX of 1956 or in the Abolition or Rent Reduction Acts, for deciding suits by the Tribunals appointed under the Act. Nor is there any provision for re-transfer of the suits by the Tribunal to the civil Court

after the determination of the issue to enable the civil Court to decide the rest of the suit. Having regard to sections 3 and 11 of the Act, the only jurisdiction of the Tribunal would be to decide the question whether an area is situate within an estate or not. If suits for possession or money are transferred to the Tribunal, there is no provision in the Act to indicate as to what is to happen to them if the question contemplated by section 11 has been decided. The Tribunal would seem to have no power to decide any consequential matters or grant relief to the parties as a result of its finding on the issue entrusted to it for decision. The Legislature could not, therefore, have contemplated that suits for reliefs which could be granted only by the civil Court, should be transferred to the Tribunal although for the purpose of granting those reliefs the civil Court has incidentally to decide the issue contemplated by section 11. The terms of that section if liberally interpreted would entail a transfer of every suit in which one of the issues relates to the determination of the question as to whether an area is situate in an estate or not. But the general words of that section have got to be interpreted in the light of the other provisions of the Act. In Maxwell on Interpretation of Statutes, 10th edition, at page 18, it is stated:—

> "General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not; or be so restricted in meaning as not to reach all the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a statute, there is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment with the degree of accuracy necessary for determining whether a particular case falls within it".

It is well-settled that in order to properly interpret any statute and arrive at its real meaning, it is necessary to get an exact conception of the scope and object of the Act. What should be considered in such circumstances is stated in an old English case known as *Heydon's Case*[1], where Lord Coke laid down that to arrive at the real meaning of a statute it was necessary to consider (1) what was the law before the Act was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy Parliament has appointed and (4) the reason for the remedy. In the Treatise on Statute Law by Craies (1952 Edition), page 91, it is stated:—

> "These rules are still in full force and effect with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof."

In *Macmillan & Co.* v. *Dent*[2], Fletcher Moulton, L.J., observed at page 120:

> "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act not only the common law, but the law as it then stood under previous statutes in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the Legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question."

Therefore, in order to properly interpret the provisions of Madras Act (XXX of 1956) it is necessary to consider what was the state of law before the Act was passed, the purpose for which the Act was passed or the mischief for which the remedy provided by it was intended. This rule is of particular importance in the interpretation of the enactment in question which specifically refers to three previous tenancy legislations in the State, namely, the Madras Estates Land Act, the Madras Estates Abolition Act and the Madras Rent Reduction Act (Act XXX of 1956) was evidently intended to provide machinery for determination of the questions relevant for the application of the Madras Rent Reduction Act (Act XXX of 1947) and the Estates Abolition Act (Act XXVI of 1948). In Maxwell on Interpretation of Statutes, page 20, it is stated:

> "The true meaning of any passage, it is said, is to be found not merely in the words of that passage, but in comparing it with other parts of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the Legislature had in view".

1. 76 Eng. Reports 637. 2. L.R. (1907) 1 Ch. 107.

One of the principal tenancy legislations in this State is the Estates Land Act, Madras Act I of 1908. That applied to Zamindari and whole inam village which is defined as an estate under section 3 of the Act.

The Madras Rent Reduction Act (Madras Act XXX of 1947), applied to all ryoti lands in an estate. Section 3 of the Act gave power to the Government to reduce the rates of rent, to collect the rent on behalf of the landholder and pay the same to him. It created also a right in the ryot to pay only the reduced rate of rent. Questions often arose as to whether any particular village was an estate or not. No machinery was provided under that Act to decide that dispute, so that the question whether a village which was notified under that Act was an estate or not had to be decided by the civil Court.

Next came the Abolition Act, namely, Act XXVI of 1948. That provided for the taking over of all inam estates by the Government and converting the tenure into a ryotwari one and granting ryotwari pattas to the persons specified in the Act. Section 9 of that Act provided a machinery to decide as to whether an estate under the Madras Estates Land Act was an inam estate or not. There was, however, no machinery either under Act XXVI of 1948, or under Act XXX of 1947, to decide whether a village or any area was an estate within the meaning of Madras Estates Land Act. That question could be finally decided only by the civil Court, though under section 9 of Madras Act XXVI of 1948 that question may be incidentally decided. Section 56 of that Act provided also for the decision of certain disputes namely, in regard to arrears of rent and as to who was a lawful ryot, by the Tribunals appointed under the Act. The remedies provided for in the enactment were, however, not complete. For instance under section 9 of Act XXVI of 1948 the Officer may decide whether an estate is an inam estate or not, but he cannot finally decide whether it was an estate at all. Act XXX of 1956 was, therefore, enacted to provide machinery for decision as to whether an area is an estate or not for the purpose of Act XXX of 1947 as well as for Act XXVI of 1948.

Section 3 of Act XXX of 1956 provided that any person interested may make an application to the Tribunal constituted under the Act for a declaration that any specified area in the application is the whole or part of an estate under section 3 (2) of the Madras Estates Land Act or an inam estate within the meaning of the Abolition Act. The two questions would respectively be relevant for the purpose of Rent Reduction Act and Abolition Act. Section 6 gives jurisdiction to the Tribunal to decide the question and an appeal is provided against such a decision under section 7. Section 10 bars the jurisdiction of the civil Court to adjudicate on any question whether any non-ryoti area is or is not an estate or in respect of any matter which the Tribunal under the Act is empowered to decide. It is evident from the provisions of the Act that the jurisdiction to decide whether a non-ryotwari area is an estate or part of an estate was for the purposes of Act XXX of 1947 and XXVI of 1948. Having regard also to the fact that the Tribunals under the Act or temporary ones created by statute for the proper working of the two enactments referred to above, and that they were not intended as a substitute to the ordinary Courts of the land, their jurisdiction should be limited to cases where the sole question is whether an area is an estate or not for the purposes of the two enactments. Section 10 should not be understood as prohibiting the ordinary civil or revenue Courts or other Tribunals from deciding that question incidentally if that were necessary for the purpose of exercising their jurisdiction. The provisions of section 10 would only preclude those Courts and Tribunals from deciding the question so as to bind either directly or indirectly the authorities in the exercise of their jurisdiction under Act XXX of 1947 and XXVI of 1948. For the purposes of these enactments the machinery provided under Act XXX of 1956 above would be competent to adjudicate the question. I am, therefore, of opinion that the provisions of Act XXX of 1956 cannot have any application to suits in civil Courts in respect of rights other than created by Act XXX of 1947 and Act XXVI of 1948. There has been no abrogation of such rights, nor has there been any stay of proceedings in regard to the enforcement of those rights by Act XXX of 1956. As I have already held, there is no means by which after the

decision of the question the Tribunal concerned can re-transfer the suit to the civil Court for granting reliefs in the light of the adjudication made by the Tribunal. Having regard to the history and context under which the Act was passed the general words in sections 10 and 11 of Act XXX of 1956 should be taken to apply only to those adjudications which became necessary for obtaining rights or declarations under Act XXX of 1947 and Act XXVI of 1948. It is, no doubt true that in such matters it is the substance of the claim of the plaintiff that ought to be looked into. If the Court comes to the conclusion that proceedings were intended only to get adjudication to enable the litigant to use it for the purposes of Act XXX of 1947 and Act XXVI of 1948 those proceedings should certainly be transferred to the Tribunal. If, on the other hand, it comes to the conclusion that the substance of the claim is only to agitate an ordinary civil right in which the question involving determination as to whether a particular area is an estate or not is only incidental, the Court would have no jurisdiction to transfer that matter and it has got to decide itself.

Section 11 under which transfer of the present case has been ordered is only a transitory provision, that is, it would relate to only those pending proceedings which if initiated after the Act could be done under section 3 of the Act, that is, a proceeding at the instance of a person interested. If, therefore, in a suit or appeal a question as to whether an area is an inam estate or not is raised by a person not interested, the Court would have no jurisdiction to transfer the proceedings under section 11. For example in the instant case if it were found that the defendant is only a tenant under a terminable lease holding under the plaintiffs, he would not be a person who would be interested in the question whether the suit land was situate in an estate or not, for whatever it may be, he would be liable to be evicted on the termination of the lease. The question of the land being in an estate will not conclude the matter, because the plaintiffs would be entitled to relief even if the land is situate in an estate if they prove that they as owners would be entitled to the possession of the land. I am, therefore, of opinion that the order of the lower Court in transferring the suit merely because there is an issue like Issue 7 is not warranted. That order is, therefore, set aside and the lower Court is directed to restore the suit to its file and dispose of it in accordance with the law. This Civil Revision Petition is allowed with cost.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

The Central Bank of India, Branch office, Madras .. *Appellant**

v.

M/S. Multanmull Misrimull Firm, G. T., Madras, by Partner Sammanmull Gnanji .. *Respondent.*

Negotiable Instruments Act (XXVI of 1881), sections 10, 82 (c) and 85 (2)—Applicability—Telegraphic transfer—Payment and discharge of—Nature of transaction—Duty of bank—Handing over of metal token to payee—If discharges bank's liability.

Banker and customer—Interest Act (XXXII of 1939)—Wrongful detention of interest—When ground for award of interest.

Sections 10, 82 (*c*) and 85 (2) of the Negotiable Instruments Act can only apply to a negotiable instrument, that is, to payment of an instrument which mentions an amount payable and which falls within the definition of a negotiable instrument. They cannot have any application to the case of a telegraphic transfer. There is no analogy between the mode of payment and discharge in the case of a negotiable instrument and the mode of payment and discharge in the case of a telegraphic transfer.

Ouchterloni and Co. v. *Midland Bank Ltd.*, L.R. (1928) 2 K.B. 214, *London Joint Stock Bank* v. *Macmillan and Arthur*, L.R. (1918) A.C. 777 and *Lloyds Bank* v. *E.B. Savery and Co.*, L.R. (1933) A.C. 201, distinguished.

Where money is paid by a person into a bank for a specific purpose and the Bank undertakes, in consideration of the charge levied, to carry out that purpose, namely to pay the money over to the individual named by the payer of the money, the bank must duly discharge the task by paying the

*L.P.A. No. 62 of 1955. 18th July, 1958. (27th Asadha 1880—Saka).

amount actually to the individual named; until and unless this is done, the bank cannot be heard to say that it has discharged its liability merely by handing over a metal token to the payee.

Quaere.—Whether a mere wrongful detention of money by the defendant would justify the award of interest to the plaintiff either under the Interest Act or under contract or according to usage, unless the equitable jurisdiction of the Court is involved?

Bengal Nagpur Railway Co., Ltd. v. *Ratnaji Ramji*, L.R. (1938) 2 Cal. 72, referred to.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Basheer Ahmed Sayeed, dated 4th March, 1955, and passed in C.C.C. A. No. 141 of 1951 preferred to the High Court against the decree of the City Civil Court, Madras, dated 12th March, 1951 and made in O.S. No. 180 of 1949.

P. V. Chalapathi Rao, for Appellant.

R. Vaidyanatha Iyer, for Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This Letters Patent Appeal is directed against the judgment and decree of Basheer Ahmed Sayeed, J., which reversed the decree of the Third Additional City Civil Judge, Madras, in O.S. No. 180 of 1949. That suit was instituted by the firm called M/s. Multanmull Misrimull, carrying on business in Perumal Mudali Street, George Town, Madras, against the Central Bank of India, Ltd., having a branch office in China Bazaar Road, Madras, for recovery of a sum of Rs. 5,055-10-0 with interest from the date of the plaint under the following circumstances. The plaintiff in the suit, the respondent before us, paid a sum of Rs. 5,000 into the China Bazaar branch of the appellant-Bank in Madras on 4th January, 1949, for the purpose of effecting a transfer of this sum by telegram to their representative in Ferozabad, one Milapchand Motaji. The appellant-Bank had a branch at Ferozabad. According to the case in the plaint, when Milapchand went to the defendant's branch at Ferozabad on 5th January, 1949, a stamped receipt, was obtained from him for a sum of Rs. 5,000 after he was identified and he was given a metal token in accordance with the practice of the Bank to enable him to receive payment of the telegraphic transfer from the cashier of the Bank. When Milapchand presented this token to the cashier, the latter offered to pay him only Rs. 1,000 and not Rs. 5,000 which was the amount of the telegraphic transfer in his favour. Milapchand naturally refused to receive payment of Rs. 1,000 and informed his principals, the plaintiffs, in Madras. In spite of demand, the defendant-Bank refused to return the sum of Rs. 5,000 paid by the plaintiff into the China Bazaar branch for the purpose of telegraphic transfer.

The defendant-Bank pleaded that on 5th January, 1949, a sum of Rs. 5,000 was paid to Milapchand after obtaining from him a duly stamped receipt. In paragraph 3 of the written statement, a further plea was taken that Milapchand was given metal token No. 5451 as soon as he executed the stamped receipt, and when Milapchand's name was called out by the cashier of the Ferozabad branch, metal token No. 5451 was produced and the person who produced that token was paid a sum of Rs. 5,000. In paragraph 4 of the written statement, the further plea taken is that the Bank had reasons to believe that Milapchand conspired with another person and attempted to play a fraud on the Bank, but was not successful.

The learned City Civil Judge, without finding definitely that it was Milapchand who produced token No. 5451 and received payment of Rs. 5,000 from the cashier of the Bank, held on the evidence that the cashier had paid Rs. 5,000 to some person who produced token No. 5451, and this, in his opinion, constituted a valid defence to the claim put forward in the plaint, and he dismissed the suit. On appeal, Basheer Ahmed Sayeed, J., differed from this conclusion of the learned City Civil Judge.

The learned Judge held that the evidence did not establish that it was not Milapchand who presented token No. 5451, or that the sum of Rs. 5,000 was paid to Milapchand by the cashier of the Bank. He further found that the payment of

Rs. 5,000 by the cashier to the person who tendered token No. 5451, even if true, would not discharge the defendant-Bank from liability.

Two questions of fact arise for our consideration. The first is whether it was Milapchand who was paid Rs. 5,000 by the cashier or whether that amount was paid, if at all, to any other individual. The second question is whether this sum of Rs. 5,000 was paid by the cashier of the appellant-Bank to the person who tendered token No. 5451. If, on the first of these questions, the finding is in favour of the appellant-Bank, namely that Milapchand was paid Rs. 5,000 there will be no necessity to consider any question of law arising in the case. But the learned counsel for the appellant maintained that, even if we came to the conclusion that the cashier paid Rs. 5,000 but this payment was not made to Milapchand, the liability of the Bank would still be discharged in this case, by reason of the fact that the payment was made in exchange for the metal token No. 5451.

The story of the payment made by the cashier on 5th January, 1949 has been elaborately discussed by both the trial Judge and Basheer Ahmed Sayeed, J., and it may not be necessary for us to review the evidence in great detail except to indicate the salient features of it. It is common ground that the following procedure is observed in the Ferozabad branch of the appellant-Bank before payment is made to customers who present either negotiable instruments or bills for payment or apply to the Bank for payment of telegraphic transfers. When the person entitled to receive payment presents himself before the concerned clerk, if that person is not already known to the Bank, he is called upon to produce an identifying witness. After being satisfied with the identification made by the witness, the concerned clerk draws up an order form, authorising payment of the money due to the person claiming payment. A stamped receipt is then drawn up and it is executed by the person claiming payment, though no money is paid at that stage. Thereafter, the order for payment is sent to the officer in charge of the Bank who authorises payment. The order authorising payment is then received back by the clerk who prepares the necessary form which gives details of the telegraphic transfer and the name of the payee. This form together with the stamped receipt executed already by the payee is then forwarded to the cashier. At the same time, the concerned clerk hands over to the payee a metal token bearing a number. The number of this metal token is entered in the telegraphic transfer form forwarded to the cashier. On receiving the telegraphic transfer form and the stamped receipt, the cashier calls out the name of the payee. The person called then presents the token to the cashier. The cashier, it is said, does not insist upon any further identification of the person presenting the token, but merely satisfies himself that the token presented corresponds to the number of the token given in the telegraphic transfer form and then pays out the money. The token is then deposited in the box kept by the cashier and entries are made by the cashier in the cash scroll maintained by him showing the payment, which are then forwarded to the accounts branch, where entries are made in the day-book and other books of account. There is no dispute that this was the procedure followed in the case of payment of the telegraphic transfer in dispute in this case.

On 5th January, 1949, Milapchand was accompanied by one Hastimull (P.W. 6) and by P.W. 2 when he went to the Bank at Ferozabad to claim payment of this telegraphic transfer. This Hastimull (P.W. 6) had himself a telegraphic transfer in his favour from the Madras Branch of the appellant Bank for a sum of Rs. 1,000. Both he and Milapchand, P.W. 1, presented themselves together before the Telegraphic Transfer Clerk, and it is not in dispute that both of them were identified by P.W. 2, a constituent of the Ferozabad branch of the appellant-Bank. Both of them were given metal tokens. The one given to Milapchand bore No. 5451, while the other given to P.W. 6 bore No. 5469. There is divergence in the evidence as to the order in which these two persons were paid by the cashier. The cashier D.W. 4, states that the T.T. form in favour of Milapchand came first and he called out Milapchand's name, and a man appeared and received payment of Rs. 5,000. Five minutes thereafter, the T. T. form in favour of Hastimull, P.W. 6, was delivered to him, and he then

called out Hastimull. A person presented himself and delivered Token No. 5469. As this token was the one referred to in the T. T. form for Rs. 1,000 the cashier took out currency notes for Rs. 1,000 and gave them to the person who had delivered the token. This person protested and refused to receive the money, saying that he was entitled to receive payment of Rs. 5,000. The cashier maintained that he had already, namely, five minutes earlier, paid the telegraphic transfer for Rs. 5,000, and the token given by the person whom he later realised to be Milapchand entitled him to receive only Rs. 1,000. Thereupon, Milapchand denied that he had received the earlier payment of Rs. 5,000 and insisted upon payment of Rs. 5,000 to him. When the cashier refused, Milapchand created an uproar. The cashier then went to the officer in charge of the Bank, D.W. 2 and reported the matter to him. Thereupon, D.W. 2 came to the counter of the cashier and found a crowd of 10 or 12 persons on the other side of the counter. This officer ordered all the clerks and the cashier to stop all transactions and he started checking the cash with the cashier. He found a difference of Rs. 1,000 between the figures as disclosed by the books and the cash as found with the cashier. There was also an excess of one rupee, which, however, has nothing to do with the dispute we are concerned with in this appeal. To this officer, the cashier produced token No. 5469 and token No. 5451, which he took from the token box. The other token is said to have been kept on the counter of the cashier on the top of the currency notes for Rs. 1,000 which Milapchand had refused to receive. The officer then searched the person of the cashier, but found no money on him. When he questioned Milapchand, he denied that he had been paid Rs. 5,000 and that he had presented token No. 5469.

In the token book, No. 5451 is entered first, and thereafter alone, token No. 5469 is entered. Both the T. T. Clerk, D.W. 3, and the officer in charge, D.W. 2, maintained that the order for payment for token No. 5451 was prepared and signed first, and a few minutes later alone, the order for payment regarding the money covered by No. 5469 was passed and signed. Their evidence agreed with the evidence of the cashier that he received the T. T. order form for No. 5451 first, and five minutes thereafter alone, he received the T. T. order form for Token No. 5469. In support of the version given by the cashier, the evidence, of D. W. 5 was relied upon. He is an employee of Madhav Glass Works of Ferozabad. On 5th January, 1949, the proprietor of this Glass works gave this witness a bearer cheque for Rs. 1,400 which he took to the Ferozabad branch of the Central Bank for encashment. He went to the clerk concerned, presented the cheque, and, after getting it translated into English, he took it again to the clerk and obtained in exchange a token. Thereafter, he went to the counter of the cashier. While he was standing there, the cashier is said to have called out the name of Milapchand. The evidence of this witness is that, as soon as this name was called out, one man responded to the call and gave his token. After receiving the token, the cashier paid that man 50 currency notes of hundred-rupee denomination. The man took the notes and went away. Thereupon this witness enquired from the cashier when he could get payment for his cheque. The cashier told him that the cheque had not come yet and there was some delay. This witness thereupon got out from the 'chabutra' of the bank and saw the same man who had received payment of Rs. 5,000 from the cashier a few minutes earlier handing over some currency notes out of the notes received from the cashier to another man. The man who received the notes then went away and the man who gave the notes returned into the banking hall. This witness was not able to identify either the man who paid the money outside the Bank or the man who received it and went away. Five minutes thereafter, he got payment of the amount of his cheque. In the meantime, he made enquiries of the persons standing in front of the cashier's counter and learned that the man who was entitled to receive Rs. 1,000 had taken Rs. 5,000 paid by the cashier and the man who was entitled to receive Rs. 5,000 was not paid that amount. The evidence of this witness lacks idetails as to identity of the persons concerned and really does not support the case of the Bank , the appellant before us. If his evidence is to be accepted, it might mean that Rs. 5,000 paid by the cashier was paid to the wrong man, namely, Hastimull, and not to Milapchand.

The learned counsel for the appellant-Bank laid stress upon two circumstances as corroborating the evidence of D.W. 4, the cashier. The first is the entries made in the books of the Bank, the pay scroll, the day-book, etc., showing that Rs. 5,000 T.T. was paid first and thereafter alone, the T. T. for Rs. 1,000 was paid. From this, he wants us to draw the inference that the cashier had actually paid out Rs. 5,000 to some person, whether it be Milapchand or not. The second circumstance relied on by the learned counsel is the fact that token No. 5451 was found in the token box kept by the cashier while token No. 5469 was kept on the counter on the top of the currency notes amounting to Rs. 1,000. We are afraid these circumstances do not support the case of the appellant-Bank that Rs. 5,000 was paid to Milapchand. Admittedly, even though the telegraphic transfer for Rs. 1,000 was not paid out, the cash book of the bank showed as though the money had been already paid out. It is true that this sum was entered that very day in the sundry deposit ledger of the Bank, and therefore there is no question of the Bank making a false entry in the cash book. For our present purpose it is sufficient to say that the mere fact of an entry in the cash book showing the amount as paid or the order in which these two entries relating to Rs. 5,000 and Rs. 1,000 are made in the cash book would not carry any weight by itself. It may be that, according to the practice of the Bank, even though a telegraphic transfer is not paid actually to the payee who had taken the metal token from the Bank, the Bank considers for its accounting purposes that sum as paid, and if cash payment is not made after a metal token has been taken by the payee, the amount is brought over to the sundry deposit ledger. But the point for our consideration is whether the mere entry in the cash scroll or the day book of the bank as also the order of entries made are sufficient to indicate payment of money to the payee concerned. Obviously, no such inference can follow.

The other circumstance relating to the receipt of tokens by the cashier is equally inconclusive. As was pointed out by Basheer Ahmed Sayeed, J., with whom we are in respectful agreement, the ordinary course of conduct of business on the part of the cashier would be, as soon at the currency notes are taken and counted, to put the metal token in the token box and not to keep it on the counter. In fact, the evidence of D.W. 4 on this point is not corroborated by the evidence of D.W. 2. According to the evidence of D.W. 2, token No. 5451 was produced by the cashier and he could not state that token No. 5451 alone was taken out from the token box while token No. 5469 was not deposited in the token box. Nothing, however, really turns upon this circumstance.

One thing stands out clear from the evidence and it is this. Milapchand was not paid Rs. 5,000. This inference is based upon two findings. The first is that it was not Milapchand who presented token, against which, if at all, Rs. 5,000 was paid by the cashier. The second is that it was Milapchand who presented the second token whatever be the number of that token, and demanded payment of Rs. 5,000. The cashier admitted in cross-examination as follows :—

"When the T. T. for Rs. 5,000 came to me, I called out Milapchand. A man came and presented token No. 5451. I made the payment, thinking that I was making payment to the person Milapchand, entitled under T. T. 9/3 to the sum of Rs. 5,000, who had signed on the front and reverse of the said T. T. Some time afterwards, I called out Hastimull. A Marwari came. At that moment, my consciousness was of having already paid Milapchand. So, I thought this man was Hastimull. . . . . . . I learnt a few minutes thereafter that man was Milapchand when he told the Manager that he was Milapchand. Then I realised that the person entitled under T. T. 9/3 to Rs. 5,000 had not been paid Rs. 5,000."

From this, it is manifest, in our opinion, that if the cashier paid Rs. 5,000 to anyone of the two persons concerned, either Milapchand or Hastimull he was not aware at the time of the payment of the identity of that person. But he became aware on the second occasion when the second token was presented to him that the person presenting that token was Milapchand. If really, as is said by the cashier, when this second person refused to receive Rs. 1,000, he then realised, or, a few minutes later realised, that this person was Milapchand, it is obvious that, at the time when he made the alleged payment of Rs. 5,000 to the first person, he was not aware that the person was Milapchand. In fact, it is impossible to believe that, within a period of five minutes, the same person could have successively pre-

sented two tokens and claimed payment twice. It is therefore clear to us that Milapchand was not paid Rs. 5,000 by the cashier.

The further question whether the cashier paid out Rs. 5,000 at all to the other man, Hastimull, has to be determined with reference to the case of both the parties. It is true that Hastimull has denied in his evidence that he received payment of Rs. 5,000 or that he presented token No. 5451. His version is that he presented the token given to him and received payment of Rs. 1,000 from the cashier at 12-30 P.M. When he wanted to leave the Bank, Milapchand, P.W. 1, requested him to stay on for a few minutes, in order that both might go together after Milapchand had received payment. Soon after this witness, P.W. 6 was paid, Milapchand, according to the evidence of this witness, asked the cashier whether he could get payment of his T. T. and the cashier asked him to wait. Some time later, Milapchand approached the cashier and gave him the token, and the cashier tendered him only Rs. 1,000. Milapchand refused to receive payment of this sum, saying that he was entitled to receive Rs. 5,000. Thereupon an uproar was created while P.W. 6 was still in the banking hall, and the officer in charge of the Bank, after checking the cash available with the cashier, searched the person of this witness and found that he had only Rs. 1,000.

In order to get over the evidence of these two witnesses as well as that of P.W. 2 the Bank attempted to establish a case not pleaded in the written statement. That case was that there was a conspiracy between P.W. 1 and P.W. 6 to exchange tokens and to draw out Rs. 10,000 from the Bank for these two tokens, though the total amount payable for these two tokens would be only Rs. 6,000. Basheer Ahmed Sayeed, J., has elaborately discussed the implications of this case of conspiracy between P.W. 1 and P.W. 6 and it is not really necessary for us to cover the entire ground. We would point out only one circumstance, which, in our opinion, is decisive in regard to this matter. By no stretch of imagination could P.Ws. 1 and 6 have thought that, by merely exchanging tokens, they could each get Rs. 5,000 from the cashier. Token No. 5469 entitled the holder of that token only to payment of Rs. 1,000, whoever it was that presented it. Unless P.Ws. 1 and 6 thought that presentation of token No. 5469 by Milapchand would enable him to get payment of Rs. 5,000 there could have been no object at all in entering into any such conspiracy. Neither P.W. 1 nor P.W. 6 could count upon the stupidity of the cashier to pay Rs. 5,000 on production of token No. 5469. The theory of conspiracy is therefore entirely baseless. Realising this, the learned counsel for the appellant tried to make out that, even though there was no conspiracy, the tokens might have been misplaced or exchanged as a result of mistake. The witness, Hastimull, was paid Rs. 1,000, according to his case, while Milapchand was standing neably. If, as the cashier wants us to believe, he called out Milapchand in the first instance and paid Rs. 5,000 to the man who answered to that call and if that person was P.W. 6, we cannot believe that Milapchand who was standing nearby would not have protested. It is almost impossible to believe that either Milapchand or Hastimull could have exchanged their tokens or lost them by accident and each picked up the other man's token. We are therefore in respectful agreement with Basheer Ahmed Sayeed, J., when he holds that the Bank has not shown by its evidence that Rs. 5,000 was paid either to Milapchand or to any person who presented token No. 5451. We are further of opinion that token No. 5451 was not presented by Hastimull but was really presented by Milapchand. This finding should be sufficient to dispose of the appeal. However, out of deference to the argument addressed to us by the learned counsel for the appellant, we would deal with the question whether the possession of token No. 5451 by the Bank implies payment of Rs. 5,000 to Milapchand and a discharge of the liability of the Bank in regard to this transaction.

The argument was propounded thus. The Bank was not under a duty to make a second identification after Milapchand had been identified before the T. T. Clerk by P.W. 2. The issue of a token to Milapchand in exchange for the stamped receipt executed by him would tantamount to the issue of a bearer cheque to him. Consequently, any person who presented the token to the cashier would be entitled

to receive payment, just as a payment is made in the case of a bearer cheque and the receipt of the token by the Cashier would amount to full discharge of the liability of the Banker. It was further said that at the time when Milapchand received the token from the T. T. Clerk, he must be deemed to have entered into a contract with the Bank, under which he agreed that payment to anyone who presented the token would discharge the Bank from liability. In support of this argument, the learned counsel referred to the provisions of sections 10, 82 (*c*) and 85 (2) of the Negotiable Instruments Act. Section 10 defines "payment in due course". Section 82 (*c*) indicates the mode in which discharge from liability is obtained by a Bank by payment of a bearer cheque. It provides that payment in due course of the amount due on the bearer cheque would absolve the Bank from all liability on the instrument. Similarly, section 85 (2) provides for discharge by payment in due course in the case of a cheque originally expressed to be payable to bearer, but endorsed in such a manner as to restrict or exclude further negotiation. In our opinion, the principle underlying these provisions can only apply to negotiable instruments. The payment made by the defendant-Bank, according to its case, to Milapchand was not a payment due on negotiable instrument. Section 10 speaks of payment in accordance with the apparent tenor of the instrument in good faith and without negligence. It further speaks of the payment to any person in possession of an instrument under circumstances which do not afford reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. It will be obvious that all these provisions can only apply to payment of an instrument which mentions an amount payable and which certainly falls under the definition of a negotiable instrument. We are unable to see what analogy there can be between the mode of payment and discharge in the case of such negotiable instruments and the mode of payment and discharge in the case of a telegraphic transfer.

The learned counsel for the appellant invited our attention to the decision in *Ouchterloni & Co.* v. *Midland Bank, Ltd.*[1]; *Lloyds Bank* v. *E. B. Savery & Co.*[2] and *London Joint Stock Bank* v. *Macmillan and Arthur*[3] to indicate that payment, made in the usual course of business by a bank without any negligence or without notice of any circumstances arousing suspicion that the person demanding payment was not the real payee would be sufficient answer to a claim upon the bill or the negotiable instrument concerned. All these decisions relate to case of payments of bills of exchange or cheques or other negotiable instruments, and cannot, in our opinion, apply to payment of a telegraphic transfer to the payee indicated in the order for transfer. In this view, it is unnecessary to examine these decisions to find out if the defence taken by the defendant-Bank is an answer to the claim made in the plaint.

Some argument was addressed to us on the question that the claim made in the plaint involved fraudulent conduct on the part of the defendant-Bank, and, consequently, the plaintiff should fail, since, it was said, the plaintiff had not succeeded in establishing any fraud on the part of the officers of the defendant-Bank. This argument is really based upon a misconception of the averments in the plaint. It is true that the word 'fraud' occurs in paragraphs 5 and 9 of the plaint. In paragraph 5, the allegation made is that the defendant's branch office falsely and fraudulently informed Milapchand that only a sum of Rs. 1,000 was payable to him and not more. In paragraph 9, the allegation is that, in the circumstances set out in the plaint, namely, by reason of the defendant's failure and fraudulent omission to pay in terms of the trust accepted by them at their Ferozabad office to the plaintiff's representative, there was a failure of consideration and of the object of the entrustment. From this, it could not be spelled out that the cause of action for the plaintiff was based upon any fraud practised by the defendant-Bank or upon any trust which was created by the transaction of the telegraphic transfer. The transaction was one in the ordinary course of the banking business in which money is

1. L.R. (1928) 2 K.B. 294.
2. L.R. (1933) A.C. 201.
3. L.R. (1918) A.C. 777.

accepted by the bank from the plaintiff for the specific purpose of paying it over to a named individual in another place. It should not be understood that we are deciding the case either on the basis of a fraud practised by the defendant-Bank or on the basis of a trust created by the transaction of telegraphic transfer. Indeed the transaction did not convert the Bank into a trustee for the plaintiff. This is a simple case where money had been paid by a person into a bank for a specific purpose, and the Bank had undertaken, in consideration of the charge levied, to carry out that purpose. The purpose was to pay it over to the individual named by the payer. Until and unless this task undertaken by the Bank was discharged, it cannot be heard to say that it was discharged from liability merely by the handing over of a metal token to the payee. It is true that the system of giving metal tokens to payees is a device adopted by the appellant-Bank and also by some other banks for the purpose of enabling payment to be made to the person entitled to it. There is no more virtue in this system than any other system adopted by the Bank for payment of cash to persons holding a claim for payment based upon a telegraphic transfer. It should not be understood that we are deciding this case with reference to a payment made in due course on a negotiable instrument presented to a bank by a holder. It should also be distinctly understood that we are not deciding this case on the basis of any responsibility of the appellant-Bank as an agent of the plaintiff. This latter case was not pleaded in the written statement, and, though one of the grounds of appeal before us mentions this point, the learned counsel for the appellant did not address any arguments to us on this question.

Only one further question remains to be noticed. The learned counsel for the appellant took exception to the decree granted by Basheer Ahmed Sayeed, J., which included a sum of Rs. 55-10-0 for interest accrued before the date of the plaint. He maintained that interest was not payable in this case either under the Interest Act or under the contract or according to usage. The learned counsel for the appellant cited the Privy Council decision in *Bengal Nagpur Railway Co., Ltd.* v. *Ratnaji Ramji*[1] for the contention that mere wrongful detention of money by the defendant could not justify the award of interest unless the equitable jurisdiction of the Court was invoked. It is unnecessary for us to consider this question since the learned counsel for the respondent agrees that this claim for interest for a period prior to the date of plaint may be disallowed.

In the result, the appeal is dismissed, but the decree granted by Basheer Ahmed Sayeed, J., would be modified by disallowing the sum of Rs. 55-10-0 included in the plaint amount for interest due up to the date of the plaint. In other respects, that decree is confirmed. The costs of this appeal will be paid by the appellant.

P.R.N. ——— *Appeal dismissed: Decree slightly modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

N. Periaswami and others .. *Petitioners**

v.

Naduviduthi Muthiah Chettiar .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *sections* 3 (3) *and* 3 (4) (*b*)—"*Deposit*"—"*Sum*"—*Meaning of—Power of Revenue Divisional Officer to direct payment or deposit of rent in kind—Conduct of tenant in failing to pay rent—Relevancy—Discretion of Revenue Divisional Officer to refuse time for depositing rent and to order eviction on ground of want of* bona fides *on part of tenant—Madras Act XXIV of* 1956, *section* 13 —*Scope—If nullifies Act XXV of* 1955.

A Revenue Divisional Officer, acting under section 3 (4) (*b*) of the Madras Cultivating Tenants Protection Act, can only direct a deposit of the rent in terms of its money equivalent and not in kind. Section 3 (4) (*b*) does not enable the Revenue Divisional Officer to direct the payment of rent in kind to the landlord. But it is open to the Revenue Divisional Officer to take into consideration the conduct of the tenant while exercising his discretion under section 3 (4) (*b*) to give him time for depositing

1. I.L.R. (1938) 2 Cal. 72: L.R. 65 I.A. 66: (1938) 1 M.L.J. 640 (P.C.).

*C.R.P. Nos. 1508 to 1519 of 1958. 30th October, 1958.
(8th Kartika of Saka—1880).

the rent. The discretion given to the officer under section 3 (4) (*b*) to grant time to the cultivating tenant to deposit the arrears of rent would include a power to refuse to grant any time and pass an order for eviction without giving the defaulter any opportunity to deposit the arrears of rent.

Where the Revenue Divisional Officer finds that the conduct of the tenant in refusing to pay the rent in kind to the landlord is not *bona fide*, he can refuse to grant him time for depositing the rent and can direct eviction. But if he decides to grant the tenant time to deposit the arrears of rent, such deposit can only be in terms of money.

Lakshmanan v. *Sambandam Pillai*, (1958) 1 M.L.J. 26, relied on.

Kishtappa Chettiar v. *Lakshmi Ammal*, (1923) 44 M.L.J. 431, distinguished.

What is contemplated under section 3 (3) (*b*), is only a deposit of a " sum ", which means a quantity or amount of money. In the context, what is meant is only a sum of money, and not the aggregate of the paddy rent as well as the costs decreed.

Section 13 of the Madras Cultivating Tenants (Fair Rent) Act, 1956, does not have the effect of nullifying the provisions of section 3 of Madras Act, XXV of 1955, especially when there is no provision in the Fair Rent Act for enforcing the orders made thereunder.

Petitions under section 6-B of Act XXV of 1955 as amended by Act XIV of 1956 and section 115 of Civil Procedure Code praying the High Court to revise the Orders of the Revenue Divisional Officer, Tirunelveli, dated 31st July, 1958 and passed in M.C.T.P.A. Nos. 13 to 24 of 1958 respectively.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Petitioners.

R. Gopalaswami Aiyangar, Messrs. Row and, Reddy and *R. Jagannathan*, for Respondent.

The Court delivered the following

JUDGMENT.—These Revision Petitions are filed by the various tenants of the respondent, and they raise a question under section 3 (4) (*b*) of the Madras Cultivating Tenants' Protection Act, XXV of 1955.

The petitioner in each of these Civil Revision Petitions took on lease certain lands for agricultural purposes from the respondent. The Revenue Court at Tirunelveli had fixed a fair rent in respect of Pishanam harvest of 1958. Under the order of the Revenue Court rent was payable in kind and not in cash. C.R.P. No. 1508 of 1958 may be taken as typical of the other Civil Revision Petitions.

In respect of the lands leased out to the petitioner in (C.R.P. No. 1508/58) the Revenue Court fixed on 5th March, 1958, for the Pishanam harvest, 1958 a rent of 12 kottahs, 4 marakkals and 2 padis of paddy, together with 18 bundles of hay. Under the terms of the lease deed executed by the tenant in favour of the landlord, the former undertook to inform the lessor as soon as the crops were ready for harvest and harvest the same after getting his orders. It was also agreed that the paddy agreed to be delivered as rent should be given to the lessor at the thrashing floor. Alleging that the tenants harvested the crops without informing the landlord, and that the rent were in arrears, the latter filed the applications out of which the above Civil Revision Petitions arise before the Revenue Divisional Officer, Tirunelveli, for eviction of the tenants under section 3 (4) of Act XXV of 1955.

The tenants contested the applications, stating that they had informed the landlord of the impending harvest a few days prior thereto, and that as they had yet time to pay the rent, the applications for eviction were premature. They also pleaded that they had deposited the proceeds of the rent in Court under section 3 (3) of the Act, and offered to pay any further sums that may be found due from them. The applications for eviction were filed on 3rd April, 1958. On 22nd April, 1958, the tenants deposited certain sums of money representing the rent payable by them, purporting to do the same under section 3 (3) of the Act. For instance the petitioner in C.R.P. No. 1508 of 1958 deposited a sum of Rs. 433·83 nP. as representing the price of paddy of 12 kottahs, 4 marakkals and 2 padis and 18 bundles of hay. Applications were also filed under the aforesaid section for receiving the deposits. Both sets of applications, namely, the application for eviction at the instance of th

lessor, and the applications for deposits under section 3 (3) of the Act, were heard together and disposed of by the Revenue Divisional Officer. In the applications for eviction, the Revenue Divisional Officer held that the tenants had failed to prove that they had intimated the landlord about the harvest, and also failed to make out that the applications for eviction were premature. The finding on this aspect of this case by the Revenue Divisional Officer is not, however, very clear. He also held that the tenants were in arrears, and directed each of the tenants to pay the landlord rent in kind as fixed by the Rent Court in respect of the lands demised to the respective tenants within two months from the date of the order, failing which an order for eviction was to follow. In the proceedings, out of which C.R.P. No. 1508 arises, he directed the petitioner herein to pay the respondent-landlord the arrears in kind as per fair rent fixed, that is 12 kottahs, 4 marakkals and 2 padis, within two months from the date of the order, failing which he was to be evicted.

C.R.P. Nos. 1508 to 1519 of 1958 have been filed by the various tenants against the orders aforesaid. The Revenue Divisional Officer also passed an order rejecting the applications under section 3 (3) of the Act in view of his findings in the applications for eviction. He directed the respondents-tenants to pay the lessor the arrears of rent in kind as per the fair rent fixed and also gave a direction that the amount deposited by the respective tenants would be refunded to them on application. C.R.P. Nos. 1682 to 1693 of 1958 have been filed by the tenants against the orders under section 3 (3) (*a*) of the Act.

Mr. Mohan Kumaramangalam, the learned advocate for the petitioners, contends that the orders of the lower Court are without jurisdiction and are otherwise unjust. He reiterated a contention urged in the lower Court on behalf of the tenants, namely, that they had given notice of the impending harvest in accordance with the terms of the lease deed, and that it was entirely due to the default of the latter that the paddy could not be delivered over in kind on the thrashing floor, as required by the provisions of the Fair Rent Act (XXIV of 1956).

The learned advocate then contended that the deposits were validly made under section 3 (3) of the Act within the time contemplated under that provision of law, and that in any event the Revenue Court had no jurisdiction to call upon the tenants to pay the rent in kind under section 3 (4) of the Act.

It is admitted that both under the terms of the lease deed, as well as the order of the Rent Court fixing the fair rent, the rent was payable in kind. Section 5 (1) of The Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), states:

"The fair rent in respect of any land may be paid either in cash or in kind or partly in cash and partly in kind, in accordance with the terms of the contract between the landowner and the cultivating tenant; in the absence of such a contract, the fair rent may be paid at the option of the cultivating tenant in any one of the above ways".

The third proviso to the section states thus :

"Provided further that where the crop raised is paddy, the landowner shall have the right to insist that the rent shall be paid in kind".

Under section 9, either party to a lease can apply to the Rent Court for the fixing of a fair rent or for deciding any dispute arising under the Act, and the decision of the Rent Court, subject to any appeal or revision, shall be final. It is not now contested that under the order of the Rent Court the obligation of the tenant is to pay the rent in kind, and that he could not discharge his liability thereunder by payment in cash. Unfortunately, however, neither the Fair Rent Act, Act XXIV of 1956, nor Act XXV of 1955, provide a machinery for enforcing that obligation of the tenant. It is contended by Mr. Mohan Kumaramangalam that even though the tenant may commit a default in the payment of rent in kind, he has got a right under the provisions of Act XXIV of 1956 to deposit its cash equivalent. He referred in this connection to the provisions of section 3 (3) of Act XXV of 1955. Section 3 (3) of the Act runs thus :

'(*a*) A cultivating tenant may deposit in Court the rent or, if the rent be payable in kind, its market value on the date of deposit, to the account of the landlord—

(i) in the case of rent accrued due subsequent to the 31st March, 1954, within a month after the commencement of this Act;

(ii) in the case of rent accrued due after the commencement of this Act, within a month after the date on which the rent accrued due.

(*b*) The Court shall cause notice of the deposit to be issued to the landlord and determine, after a summary enquiry, whether the amount deposited represents the correct amount of rent due from the cultivating tenant. If the Court finds that any further sum is due, it shall allow the cultivating tenant such time as it may consider just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing such further sum inclusive of such costs as the Court may allow. If the Court adjudges that no further sum is due, or if the cultivating tenant deposits within the time allowed such further sum as is ordered by the Court, the cultivating tenant shall be deemed to have paid the rent within the period specified in the last foregoing sub-section. If, having to deposit a further sum, the cultivating tenant fails to do so within the time allowed by the Court, the landlord may evict the cultivating tenant as provided in sub-section (4).

(*c*) The expression ' Court ' in this sub-section means the Court which passed the decree or order for eviction or, where there is no such decree or order, the Revenue Divisional Officer."

It is clear from the provisions of the sub-section that a tenant could deposit in Court the market value of the rent payable in kind calculated according to the value on the date of the deposit. Rules have been framed under section 7 (1) of the Act. They are consistent only with the contention advanced on behalf of the petitioners, namely, that the deposit contemplated by the section is a deposit in cash.

It is contended on behalf of the respondent-landowner that although a tenant may deposit the value of the rent in cash in an application under section 3 (3) (*a*) of the Act, the Revenue Divisional Officer has power to insist upon the rent being paid in kind if he thinks it proper in any given case. Reference was made in this connection to the provisions of section 13 of the Fair Rent Act (Act XXIV of 1956), for the contention that all provisions in any other enactment contrary to the provisions of the Fair Rent Act were invalid, and that therefore the provisions of the Fair Rent Act should be strictly complied with. I am unable to agree with the contention that section 13 could have the effect of nullifying the provisions of section 3 of Act XXV of 1955, especially when there is no provision in the Fair Rent Act for enforcing the orders thereunder. Default in the payment of the fair rent fixed could only be treated as a default by the tenant and the provisions of Act XXV of 1955 would apply.

Mr. R. Gopalaswamy Iyengar, the learned advocate for the respondent, then contended that section 3 (4) (*b*) of the Act is consistent with a power existing in the Revenue Divisional Officer to direct the payment of the rent in kind. Section 3 (4) (*b*) of the Act runs thus :—

"On receipt of such application, the Revenue Divisional Officer shall, after giving a reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order either allowing the application or dismissing it and in a case falling under clause (*a*) of sub-section (2) in which the tenant had not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable having regard to the relative circumstances of the landlord and the cultivating tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct. If the cultivating tenant deposits the sum as directed, he shall be deemed to have paid the rent under sub-section (3) (*b*). If the cultivating tenant fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction."

It is stated that although the section contemplates only a deposit of a sum, the word sum should be interpreted to mean a deposit of paddy rent as such, as that interpretation would have the merit of giving full effect to the contract between the parties and the provisions of the Fair Rent Act of 1956.

In the present case the Revenue Divisional Officer has directed the tenant to pay rent in kind to the landowner within two months of the date of the order. In *Lakshmanan* v. *Sambandam Pillai*[1], Subramanyam, J., held that the word ' deposit ' in section 3 (4) (*b*) of the Act does not contemplate a payment of rent to the landowner directly by the tenant, but that the deposit should be made only in the Court. The learned Judge has held that the Legislature deliberately used the word 'deposit'

1. (1958) 1 M.L.J. 26.

in preference to the expression ' pay to the landlord or tender to the landlord ' so as to avoid any further enquiries as to the alleged tenders or payments. It is, therefore, clear that what is contemplated under section 3 (4) (*b*) is the deposit of the rent in Court and the direction to pay the rent to the landowner would not be valid.

Learned Counsel for the respondent then contended that the Revenue Divisional Officer acting under section 3 (4) (*b*) of Act XXV of 1955 could validly direct the deposit of grain rent in Court as the words 'deposit' would include a case of storing up or keeping a moveable property like paddy. He referred to the decision in *Kishtappa Chettiar* v. *Lakshmi Ammal*[1], for the view that where one man's property was handed by that man to another, the latter became a depository. If the provisions of the section used the word ' deposit.' alone, it might be there is some force in the contention of the learned advocate for the respondent. But what the section says is that time may be allowed to the cultivating tenant for depositing the arrears of rent payable under this Act inclusive of such costs as he may direct, and if the cultivating tenant deposits the sum as directed he shall be deemed to have paid the rent as under section 3 (3) (*b*), and if the cultivating tenant fails to deposit the same as directed, the Revenue Divisional Officer shall pass an order for eviction. What is, therefore, contemplated is deposit of a sum. The word 'sum' has been defined in the Shorter Oxford Dictionary as 'a quantity or amount of money'. It is, however, contended that the word ' sum ' may imply a sum total of the costs and the arrears of rent, and it would be taken as meaning a total amount or quantity aggregate or the whole. I am of opinion that in the context what is meant is only a sum of money, and not aggregate of the paddy rent as well as the costs decreed. Deposits in Courts, whether Civil or Revenue, are credited in the Government accounts. It is well known that Government accounts are kept on a cash basis. There is no provision for receiving goods as deposits. Indeed having regard to the number of applications that would be entertained by the Revenue Divisional Officer under Act XXV of 1955, there would be very little warehousing accommodation available in Courts for keeping large stocks of paddy and protecting them. From the provisions of section 3 (3) (*b*) which provided for a deposit of rent by the tenant before default occurred one can reasonably assume that the Legislature only intended in a case of payment after default under section 3 (4) (*b*) a deposit of money, and not of paddy. It is contended that while the rule-making authority has prescribed rules for deposits under section 3 (3) (*b*), there is no similar provisions for deposit under section 3 (4) (*b*), and that, therefore, it was possible to insist upon the deposit of rent in kind in Court. I cannot agree with the contention. There was a necessity for the rule in the case of deposit under section 3 (3) (*b*) as there was no previous proceeding pending in a Court and the proceedings contemplated in that section have to be initiated only on such deposit. But in the case under section 3 (4) (*b*) the deposit is occasioned by the order of Court and there are provisions under the existing law as to how such deposits are to be made, and there is therefore no necessity for any rules being framed in that regard. I am, therefore, of opinion that a Revenue Divisional Officer acting under section 3 (4) (*b*) could only direct a deposit of the rent in terms of its money equivalent and not in kind. It may be that the tenant may in particular cases deposit less by saying that the market rate was less than what it actually was. Power is given to the Revene Divisional Officer under the section to adjudicate the sufficiency of the deposit. It is no doubt true that the effect of this interpretation of section 3 (4) (*b*) would not enable the carrying out the wholesome provisions of section 5 of the Fair Rent Act of 1956. Even apart from that provision stiuplations for payment of rent in kind are of utmost value to the landowner. Produce thus received are generally utilised for consumption by the landowner's family. This would be more so in the case of owners of small holdings, who may not have means to purchase paddy at market rate. It would be no satisfaction or even justice to the landowner, be he rich or poor, to be told that he could not enjoy the produce of his own land at the whim and caprice of a tenant whom he let into possession. Monies deposited by tenant as equivalent to grain

1. (1923) 44 M.L.J. 431.

rent could not always be its substitute and in many cases it may hit the poor landowners hard if they were to take that money and purchase rice therefrom, perhaps at prices different from that at which they were paid or of quality different from that grown on their lands. In a case where the obligation of the tenant under his contract, or under the provisions of the Fair Rent Act, was to pay the rent in kind to the landowner, he, by his committing a default by not paying in kind, would get an advantage by resorting to the provisions of sections 3 (3) and 3 (4) (*b*). These difficulties, however, cannot enable a Court to construe the provisions of the section as authorising a deposit of rent in kind. That is a matter for the Legislature to rectify. I am of opinion that section 3 (4) (*b*), as it stands, could not enable the Revenue Divisional Officer to direct the payment of rent in kind to the landlord.

But at the same time, I am of opinion that it would be open to the Revenue Divisional Officer to take the conduct of the tenant into consideration while exercising his discretion under section 3 (4) (*b*) of the Act to give him time for depositing the rent. Under section 3 (4) (*b*) the Revenue Divisional Officer has got a discretion to allow the cultivating tenants time to deposit the arrears of rent. This provision, in my opinion, would include a power to refuse to grant any time and pass an order for eviction without giving the defaulter an opportunity to deposit the arrears of rent. In a case where the Revenue Divisional Officer finds that the conduct of the tenant in refusing to pay the rent in kind is not *bona fide*, he could refuse to grant him time for deposit of the rent and direct an eviction. But if he decides to grant the tenant time to deposit the arrears of rent, such deposit could be only in terms of money.

I am, therefore, of opinion that the orders of the lower Court directing the payment of rent in kind cannot be supported. They are set aside. The applications are remanded to the lower Court for disposal as to whether the tenants are entitled to get any indulgence by way of being enabled to deposit the arrears of rent and costs. No order as to costs.

Petitions allowed: Orders set aside and applications remanded.

P.R.N.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

R. T. Perumal .. *Appellant**

v.

John Deavin and another .. *Respondents.*

Arbitration Act (X of 1940), *section* 16 *and Companies Act (VII of* 1913), *section* 208-C (3)—*Scope—Determination of dissentient member's interest in the company by arbitration—Appeal against decree made in the revised award—Validity of the order of remittal—If can be questioned—If can be a ground for setting aside award.*

The Court has power to remit an award only on one of the grounds specified in section 16 of the Arbitration Act and under no other ground. If therefore the Court remitted an award on any ground other than those specified in that section such an order would be without jurisdiction. One of the grounds on which a revised award can be sought to be set aside is that it was the result of an invalid order of remittal.

The basis of the first award was totally wrong in law, namely, the determination of the price of dissentient members' interest under section 208-C (3) of the Companies Act, 1913, by dividing the estimated market-value of the net assets of the company by the number of ordinary shares. The order of remittal was valid and proper.

Under section 208-C (3) of the Companies Act what the arbitrator has to determine is the price at which the interest of the dissentient members should be purchased by the liquidator. The

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* O.S. Appeals Nos. 11 of 1958 and 42 of 1958. 24th December, 1958. (3rd Pausa—Saka 1880.)

price assumes a sale at least notionally. The market may be hypothetical. In fixing the price of the dissentient members' interest the arbitrator certainly will have to take into account the assets of the company and its liabilities but he will have to take into account several other factors as well.

Case-law discussed.

On appeal from the Judgment and Order of the Honourable Mr. Justice Balakrishna Ayyar, dated 15th October, 1957 and 21st November, 1957 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. Nos. 275 of 1956 and 330 of 1956.

R. Gopalaswami Ayyangar, K. M. Venkatavaradachari and *T. R. Srinivasa Ayyar*, for Appellant.

O. T. G. Nambiyar for *Messrs. King & Partridge* and *P. S. Chandrasekhara Ayyar*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—R. T. Perumal the appellant in O.S.A. No. 11 of 1958 and D. R. Mahajan the appellant in O.S. A. No. 42 of 1958 are two shareholders in a limited company called the Nilgiri Neergundi Estates Company, Limited, hereinafter called the Neergundi Company which was incorporated on 22nd July, 1957 with a paid up capital of Rs. 3,67,076 consisting of 2000, 7 per cent. preference shares of Rs. 75 each, and 1,08,538 ordinary shares of Rs. 2 each. The main object of the company was growing and selling of tea and coffee. The company owned about 1447.62 acres of land out of which about 619 acres comprised coffee plantations and about 341 acres tea plantations. The company had no factory of its own in which the green tea leaf grown on its estate could be processed into marketable tea. The company used to sell its tea leaves to a neighbouring company called Kil Kotagiri Tea and Coffee Estates Company, Limited, which will hereinafter be referred to as Kil Kotagiri Company. Perumal held 14,900 ordinary shares and Mahajan held 5,900 ordinary shares in the company on the material date. On 31st August, 1955, the Neergundi Company passed a special resolution which ran as follows :—

"1. That the company be wound up voluntarily.

2. That it is expedient that the business of the company should pursuant to section 208-C of the Indian Companies Act, 1913, be transferred to The Kil Kotagiri Tea and Coffee Estates Company, Limited, upon the terms and subject to the conditions contained in the draft agreement expressed to be made between the company and its Liquidators of the one part and the said Kil Kotagiri Tea and Coffee Estates Company Limited of the other part, which draft is verified by the signature of Lionel Aldred, a Director of the Company.

3. That Messrs. John Deavin, Norman Blenkinsop and John Ashton of Messrs. Fraser & Ross, Madras, be appointed Liquidators of the company with joint and several powers for the purposes of such winding up at a remuneration of Rupees two thousand and that they be authorised to exercise all or any of the powers given to a Liquidator by clauses (*d*), (*e*) and (*h*) of section 179 of the Indian Companies Act, 1913.

4. That the Liquidators be and are hereby expressly authorised to execute the said agreement and to take all such steps and to do all such things as they may deem necessary or expedient to complete the transfer of the business of the company upon the terms contained in the said agreement."

In pursuance of the said resolution an agreement of sale and purchase, dated 1st October, 1955, was entered into between the Neergundi Company and the Kil Kotagiri Company. The consideration for the sale and transfer was the allotment by the purchasing company, that is, the Kil Kotagiri Company to every member of the selling company, that is, the Neergundi Company one ordinary share of Rs. 2 each in purchasing company credited as fully paid up for or in respect of every two fully paid ordinary shares in the selling company and a cash payment of Rs. 3,75,000 *plus* a sum equal to all cash in hand and at the bank at the date of completion. It was provided that the purchasing company should pay the selling company for all consumable stores belonging to the latter and that the coffee crop for seasons 1954-55 be delivered to the agents of the Indian Coffee Board and all out

standing book debts to the selling company. On 3rd September, 1955, both the appellants before us sent notices to the Liquidators appointed by the resolution under section 208-C of the Indian Companies Act, 1913, requiring them to purchase their interests as provided in that section. The Liquidators offered to pay to the appellants at Rs. 10 per share for the shares held by them but the appellants refused the offer. Mr. Perumal wanted Rs. 20 per share while Mr. Mahajan wanted Rs. 24-8-0 per share. The Liquidator did not agree. After some correspondence eventually the two appellants before us filed two applications on the Original Side of this Court, Applications Nos. 3254 and 3562 of 1955 *inter alia* praying that this Court may be pleased to fix the value of the shares belonging to the two appellants and standing in their names under the provisions of section 208-C (3) of the Indian Companies Act *suo motu* or by arbitration. On these two applications Balakrishna Iyer, J., passed an order on 6th January, 1956, appointing Sri P.S. Chandrasekhara Iyer, retired District Judge and advocate as the sole Arbitrator for determining the price to be paid for 5,900 and 14,900 shares held by D. R. Mahajan and R. T. Perumal respectively in the company. In accordance with this order Sri P. S. Chandrasekhara Iyer after an elaborate enquiry passed his award on 17th June, 1956. In and by that award he fixed the amount payable as the price of the shares held by Mahajan at Rs. 1,11,731-4-0 and the amount payable for the shares held by Perumal at Rs. 2,82,168-12-0. It may be stated briefly that he arrived at the value of Rs. 18-15-0 per share by first valuing the gross assets of the company and subtracting therefrom the liabilities thus arriving at the net value of the estate and dividing the same by the number of ordinary shares, namely, 1,08,538. He then took out an original petition, O.P. No. 275 of 1956 praying that his award may be received and suitable orders may be passed on the petition. This petition was filed under section 14 (2) of the Indian Arbitration Act of 1940 and Rule 5 of the rules framed thereunder.

The Liquidators of the Neergundi Company filed another petition O.P. No. 330 of 1956 praying that the award may be set aside or in the alternative remitted back to the arbitrator for reconsideration. Both the petitions were heard together by Balakrishna Iyer, J., and on 21st March, 1957, the learned Judge passed the following order :—

"The award filed in O.P. No. 275 of 1956 by Mr. P. S. Chandrasekhara Iyer, arbitrator be and is hereby remitted back to the said arbitrator for reconsideration and decision in the light of the observations contained in the judgment dated 21st March, 1957 herein and that the said arbitrator do submit his decision to this Court on or before the 21st July, 1957".

Accordingly the arbitrator again heard the parties by their counsel and taking into consideration the directions contained in the said order of Balakrishna Iyer, J., and the evidence adduced before him both before and after remittal he gave his decision fixing the price payable for each share held by the appellants at Rs. 12. The amount payable to Mahajan at that rate would be Rs. 70,800 and the amount payable to Perumal in respect of the shares held by him would be Rs. 1,78,800. We have ascertained from the records that both the appellants before us filed objections to the decision of the arbitrator after remittal which was in the nature of a revised award. The main objection was that the order of remittal passed by Balakrishna Iyer, J., on 21st March, 1957, was untenable in law. When the matter came up before Balakrishna Iyer, J., finally on 15th October, 1957, the only point pressed before him was as regards costs. After giving certain directions as to costs in the proceedings before him he passed a decree in terms of the revised award. The petitions were again mentioned before the learned Judge on 21st November, 1957, on which date in terms of the revised award the following decree was passed :—

"That the respondents 3 to 5 in O.P. No. 275 of 1956 pay to (*a*) respondent 1 therein a sum of Rs. 70,800 (rupees seventy thousand and eight hundred) being the value of 5,900 shares and (*b*) respondent 2 therein a sum of Rs. 1,78,800 (rupees one lakh seventy eight thousand and eight hundred) being the value of 14,900 shares at Rs. 12 (rupees twelve) per share, with interest on both the said sums at 6 per cent. per annum from 15th October, 1957, to the date of payment ;

That the parties herein excepting the Arbitrator do pay and receive the proportionate costs of these petitions as per the award both before this Court and before the said Arbitrator when severally taxed and noted in the margin hereof with interest thereon at six per cent. per annum from the date of taxation to the date of payment ; and in taxing the said costs, advocates fee at Rs. 5,000 (rupees five thousand) for each party (treating D. R. Mahajan and R. T. Perumal as one party) be allowed and that the said costs do also include the amounts paid to the arbitrator already by the respondents 3 to 5 in O.P. No. 275 of 1956 ; that the Liquidators, respondents 3 to 5 in O.P. No. 275 of 1956 shall be entitled to set-off or adjust the payments they have made to the arbitrator herein in the first instance in the said manner."

Respondent 1 is D. R. Mahajan, respondent 2 is R. T. Perumal and respondents 3 to 5 are the Liquidators of the Neergundi Company. The appeals now before us were then filed by the two shareholders respectively.

Mr. O. T. G. Nambiar, learned counsel for the respondents, liquidators took up a preliminary objection that the appeals were not competent. He mainly relied on the provisions of section 17 of the Indian Arbitration Act which runs as follows:

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

It is necessary to refer to the other provisions of the Act to follow the contentions of the learned counsel on both sides. Under section 14 when the Arbitrator has made his award, he shall sign it and shall give notice in writing to the parties of the making and signing thereof. He shall then cause the award or a signed copy of it together with any depositions and documentary evidence which may have been taken and proved before him to be filed in Court and the Court shall thereupon give notice to the parties of the filing of the award. Section 15 gives power to the Court to modify or correct an award. Section 16 is very material and is in the following terms :—

"(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines "any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred ; or

(b) where the award is so indefinite as to be incapable of execution ; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court :

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

Section 30 provides that an award shall not be set aside except on one or more of the following grounds, namely :—

"(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;

(c) that an award has been improperly procured or is otherwise invalid."

Section 39 confers a right of appeal from certain orders and from no others passed under the Act to the Court authorised by law to hear appeals from original decrees of the Court passing the order. Such appealable orders include, an order setting aside or refusing to set aside an award. Section 44 enables the High Court to make rules consistent with the Act *inter alia* as to the filing of awards and all proceedings consequent thereon or incidental thereto. "Court" is defined in section 2 (c) as meaning a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit.

Mr. Nambiar's contention was that the appeals purport to be against the decree passed by Balakrishna Iyer, J., agreeing to the award and section 17 of the Act prohibits an appeal from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award. According to him such a ground does not exist in this case. He also contended that the validity of the order remitting the award cannot be questioned in these appeals.

Mr. Gopalaswami Iyengar for the appellants sought to maintain the appeals on several grounds. He attempted to get over the bar of section 17 of the Act by contending that the revised award according to which a decree has been passed is not in accordance with the award because the remittal order was bad and consequently the only valid award must be deemed to be the original award made by the arbitrator and the decree now passed is certainly not in accordance with that award. We are unable to agree with this contention which places such a strained construction on the language of section 17. The award referred to in section 17 is the award which the Court accepts and following it passes judgment and decree. There is no indication in the Act as to what should happen after the Court remits the award. Sub-section (2) of section 16 implies that the arbitrator shall submit his decision to the Court within the time fixed by the Court. It is not clear whether the decision so submitted should be treated as a new award which has again to be filed. It is also not clear whether the parties would urge their objections to the validity of the decision submitted by the arbitrator. The opening words of section 16 (1) appear to contemplate the Court remitting the award from time to time. It may be, if the Court is satisfied that one of the grounds mentioned in clauses (*a*), (*b*) and (*c*) of section 16 (1) exists in respect of the decision submitted by the arbitrator or as one may call it, a revised award it may again remit the award to the arbitrator. But if the Court sees no cause to remit the award or to set aside the award, the Court shall pronounce judgment according to the award and a decree will follow upon the judgment so pronounced. We are unable to hold that because an order remitting the original award is bad, it follows that the decree passed on the basis of the revised award could be said to be in excess of or not otherwise in accordance with, the award.

Mr. Gopalaswami Iyengar's next contention was that the appeals are maintainable, under clause (*vi*) of section 39 of the Act. The judgment of Balakrishna Iyer, J., accepting the revised award must be deemed to be also an order refusing to set aside the revised award. There was no formal application as such to set aside the revised award but admittedly objections were filed to the revised award by the two appellants before us mainly on the ground that the order of remittal was itself bad. These objections can be deemed to be applications to set aside the award. He relied on a decision of Chandra Reddi, J., in *Ramaswami Servai* v. *Muthirulayee*[1], in support of his contention. In that case notice of the filing of the award was served on the party. He filed a counter affidavit attacking the genuineness and validity of the award and prayed that the Court may be pleased to dismiss the petition but there was no application as such to set aside the award. The learned Judge held that the counter-affidavit can be tantamount to an application for setting aside the award within the meaning of section 17 of the Arbitration Act. A similar view was taken in *Ram Alam Lal* v. *Dukhan*[2]. It is true that there was no formal order refusing to set aside the revised award but in the circumstances the order accepting the revised award should be deemed to be a composite order comprising an order refusing to set aside the award. Vide *Ishwar Dei* v. *Chhedu*[3], and *Antarijami* v. *Ketaki Debi*[4]. So his argument ran. We did not understand Mr. Nambiar to say that no application to set aside a revised award could be filed. If, that be not so, it would mean that the Court has no option except to pass a decree in accordance with the award which is invalid for any of the reasons mentioned in section 30 of the Act. All that he could say was that there was no formal appli

1. (1954) 1 M.L.J. 7.
2. I.L.R. (1952) 2 All. 664.
3. A.I.R. 1952 All. 802.
4. A.I.R. 1952 Orissa 173.

cation to set aside the revised award. But this technical objection is not supported by any of the provisions of the Act.

Mr. Nambiar, however, coutended that the order of remittal cannot be questioned in these appeals even if they were competent. He relied on a ruling of this Court in *Subbiah Iyer* v. *Subramania Iyer*[1], which was followed by the Lahore High Court in *Hem Chandra* v. *Amiyabala*[2]. There were also other decisions cited to us, namely, *George* v. *Vastian Soury*[3], and *Vengu Iyer* v. *Yegyam Iyer*[4], but in our opinion these decisions do not materially help us in this case because they all related to a different set of facts. In those cases the arbitration was in a pending suit but there are observations in the decision, *Subbiah Iyer* v. *Subramania Iyer*[1], which *prima facie* appear to support the contention or Mr. Nambiar namely :—

"It was not contended that an appeal would lie against a decree passed by the Court in accordance with the award on the ground that the Court had improperly refused an application for an order of remittal under section 520, Civil Procedure Code and the policy of the "law appears to be to refuse to allow appeals against decrees in accordance with awards on the ground either that an order under section 520, Civil Procedure Code, was improperly made or improperly refused."

Much of the force of the observation is lost by the obvious fact that it was practically conceded that an appeal would not lie against a decree passed by the Court in accordance with the award on the ground that there had been an improper refusal of an application for an order of remittal. Mr. Nambiar conceded that there was no right of appeal against the order of the Court remitting the award to the arbitrator. He also had to admit that the Court would have jurisdiction to remit an award only on one of the grounds specified in section 16 and under no other ground. If, therefore, the Court remitted an award on any ground other than those specified in that section such an order would be without jurisdiction. We then asked Mr. Nambiar what was the remedy of the party aggrieved by such an invalid remittal. Mr. Nambiar frankly stated that there was no remedy so far as he could see. We do not think that we could subscribe to this result unless we are forced to. In our opinion one of the grounds on which a revised award can be sought to be set aside is that it was the result of an invalid order of remittal. That was the first objection which the appellants took in their counter-affidavits.

In this view it is not necessary to consider the other contention of Mr. Gopalaswami Iyengar that section 39 of the Act would have no application to an appeal under Letters Patent as it deals only with appeals from one Court to another. We hold that the appeals are competent.

On the merits the only question which arises is whether Balakrishna Iyer, J., was justified in remitting the award made by the arbitrator on 17th June, 1956.

The power of the Court to remit an award to the arbitrator for reconsideration is contained in section 16 of the Indian Arbitration Act. It was admitted by Mr. Nambiar, learned counsel for the respondents who supported the order remitting the award that an award could be remitted only on one or more of the grounds mentioned in clauses (*a*), (*b*) and (*c*) of section 16 (1) of the Act and on no other ground. Vide *Shree Meenakshi Mills Ltd.* v. *Patel Brothers*[5] where the Privy Council observed:—

"The section specifies three sorts of defects which may necessitate reconsideration of an award and empowers the Court to remit the defective award in the cases specified (and in no others) to the arbitrator or umpire and to fix the time within which the arbitrator or umpire is to submit his decision to the Court."

It was also his case that the only ground on which Balakrishna Iyer, J., remitted the award is that an objection to the legality of the award was apparent upon the face of it. Mr. Gopalaswami Iyengar, learned counsel for the appellants contended that there was no such valid objection to the legality of the award apparent

1. (1908) 18 M.L.J. 485 : I.L.R. 31 Mad. 479.
2. (1924) 84 I.C. 693.
3. (1898) I.L.R. 22 Mad. 202.
4. (1950) 2 M.L.J. 642.
5. (1944) 2 M.L.J. 17 : 71 I.A. 106 : I.L.R. (1944) Bom. 469 at 475 (P.C.).

upon the face of it. The reference to the arbitrator was made under section 208-C (3) of the Indian Companies Act which runs thus :—

"If any member of the transferor company who did not vote in favour of the special resolution expressed his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided."

Sub-section (6) of the same section makes the provisions of the Indian Arbitration Act other than those restricting the application of the Act in respect of the subject-matter of the arbitration applicable to all arbitrations in pursuance of the section. What the arbitraotr had, therefore, to decide was what is the price of the interest of the dissentient members of the Neergundi Company who are the appellants before us. The arbitrator arrived at the price of Rs. 18-15-0 per share held by the appellants thus :—He estimated the value of the assets of the Neergundi Company and deducted therefrom the liabilities of the company and took the balance as the net value of the estate. He divided the amount of this value by the number of ordinary shares to fix the value per each share. The following extract from his award gives details of the calculation :—

Fixed Assets.

		Rs.	*Rs.*
Freehold land	..	16,87,750	
Buildings	..	1,54,935	
Plant and machinery	..	19,627	
Furniture	..	10,801	
			18,73,113
Add motor cycle, etc., as per Liquidators' statement.			6,28,365
			25,01,478
Less Liabilities	..		4,44,617
Net value of estate as on 1st July, 1955	..		20,56,861
Number of ordinary shares at Rs. 2 each. Rs. 108,538.			
Value per share Rs. 18-15-0 (omitting pies in the calculation)			
The amount payable for Mr. Mahajan's 5,900 share is			1,11,731-4-0
The amount payable for Mr. Perumal's 19,500 shares is			2,82,168-12-0

In the course of his award the arbitrator confessed that no direct precedent was available as to how the interest of a dissentient member should be valued under section 208-C (3) of the Companies Act. He came to the conclusion that the interest of a dissentient shareholder was to be valued on the basis of his interest in the assets of the company that had been wound up. He agreed with the contention of the appellants before us that the assets of the company had to be valued and the price payable to the appellants should be fixed in proportion to the shares which they held in the company to the total number of ordinary shares. He drew a distinction between the language of section 208-C (3) of the Act and the language used in the earlier section, namely, section 153-B and observed :—

"Under section 208-C of the Act it is not the shares of the dissentient shareholder that have to be purchased as in section 153-B but the interest of the dissentient shareholder has to be purchased at a price. What is the interest of a dissentient shareholder in a company which has been wound up ? His interest can only be in the assets of the company that has been wound up."

Balakrishna Iyer, J., held that the basis on which the arbitrator proceeded was wrong, and that he erred in assuming that the dissentient shareholders were entitled to be paid their proportionate share of the market value of the net assets of the com-

pany. The reasoning of the learned Judge may be summarised thus :—The shareholders are not the co-owners of the properties of the company. Though the value of the assets of the company would be a very material factor which would affect the price of the interest of the dissentient shareholder, the one cannot be fixed as a fraction of the other. It is not correct to say in law that the Neergundi Company stood wound up in the sense that it stood dissolved when the special resolution for winding up was passed. The dissentient shareholder is not, therefore, entitled to a proportionate part of the break-up value of the assets in the undertaking for on the dissolution of a company every member thereof is entitled to be paid his proportionate portion of the net assets of the company. He is so entitled to be paid only out of the amount actually realised in exchange for the properties of the company, and not a proportionate portion of their market value. The learned Judge pointed out what the arbitrator should have done but which he did not do. He stated :—

"He should have tried to find out what the price was which the interests of the dissentients would have fetched immediately before the resolution to wind up was passed. He should have posed the question, how much would a reasonable man have been prepared to pay for that interest. No doubt a prudent purchaser would take into account the value of the assets of the company in making his offer, but that would be only one consideration and the price of the interest cannot be expressed as a fraction of the net assets of the company."

After holding that the arbitrator had proceeded on a completely wrong legal basis in determining the value of the interest of the dissentient member he proceeded to indicate the various considerations and factors which should be taken into account in arriving at the proper price to be fixed. The learned Judge wound up his judgment thus :—

"I recognise that it is not at all easy to make allowance for all these varying circumstances. Nonetheless the final conclusion must represent the result of the examination of these factors. The question is not what is the net value of the assets of the company, and what is the fraction thereof that is represented by the shares which the dissentients hold. The question is : If the interest of the dissentients is sold as a block, what money will it bring? That is the question for which an answer must be found. I have set out various considerations that must be taken into account; but these are not to be regarded as being exhaustive."

In spite of diligent research, learned counsel appearing before us were unable to draw our attention to any decision of the English Courts or in India directly bearing on the question. The question, therefore, falls to be decided on an application of the general principles of the company law and the language of the material provisions of the Indian Companies Act. What a dissentient member is entitled to under section 208-C (3) of the Indian Companies Act is the price of his interest at which he can require the liquidator to purchase it. It is such a price that has to be determined by arbitration. We consider that the implication of the words "Purchase and price" should not be overlooked. A notional sale is contemplated. Obviously the interest of the dissentient member is dependent on the shares which he holds in a transferor company. A distinction was sought to be drawn between the language in section 153-B and section 208-C. Section 153-B deals with a case of a scheme involving the transfer of shares of a company to another company. It provides *inter alia* that if any shareholder dissents from a scheme involving the transfer of shares the shares of such dissenting shareholder are bound to be acquired. A distinction is drawn between the acquisition of shares referred to in section 153-B and the purchase of interest in section 208-C of the dissenting shareholder. We do not think that much can be made out of this difference. Section 153-B deals with a case of a transfer of shares of a company which is a going concern and which has not been wound up or directed to be wound up ; whereas section 208-C deals with a case where the company is proposed to be, or is in the course of being wound up altogether voluntarily and it is in the case of such winding up that the whole or part of the business or the property of the company is proposed to be transferred or sold to another company. In the case of a company which is not being wound up it is appropriate to speak of the shares as being acquired the price being the price of

the shares at the market value but when the company is being wound up there can be no question of sale or acquisition of shares as such. Hence the use of the word "interest".

What is the interest of a shareholder by virtue of his holding the shares in a company? Farwell, J., in *Borland's Trustee* v. *Steel Brothers & Co. Ltd.*[1] observed at page 288 :—

"A share is the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with section 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount."

The shareholders are not in the eye of the law part-owners of the undertaking. The undertaking is something different from the totality of the share holdings. Vide (*Short* v. *Treasury Commissioners*[2]. Reference was made by Mr. Gopalaswami Iyengar, learned counsel for the appellants to section 211 of the Indian Companies Act which runs thus :—

"Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and subject to such application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company."

He contended that this provision indicates the right of a shareholder to obtain a proportionate share of the net assets of the company because at the end of the winding up after all liabilities have been met and all preferential payments have been made the property of the company is distributed among the members including the shareholders. In our opinion this section does not support the argument which is involved in the contention of the appellants' learned counsel that at any given point of time a shareholder is notionally entitled to an aliquot part of the net assets of the company. It may be that the prospect of distribution such as is contemplated under section 211 at the conclusion of a winding up, would be a material factor in assessing the value of the interest of a shareholder in virtue of his holding shares in the company. Undoubtedly if the net assets which will be available for distribution are likely to be of considerable value then the value of the interest of the shareholder will also be enhanced. It is not tanamount to saying that the value of the interest is an arithmetical fraction of the estimated market value of the net assets of the company on the date of the winding up or on the date when the resolution is passed for the transfer of the business of the company to another company.

Before Balakrishna Ayyar, J., and before us certain decisions of the English Courts were cited. Admittedly none of these directly bears on the question which falls to be decided. We shall, therefore, briefly refer to some of them. *Imperial Land Company of Marseilles,* In re[3] (*Vining's case*) a company having resolved on a voluntary winding up, and reconstruction of the company, with a new capital, new articles and a new name, a dissentient shareholder gave notice to the liquidators under section 161 of the Companies Act, 1862, requiring them to purchase his interest in the company. The liquidators took a transfer of his shares. After the transfer the dissentient shareholder's name was placed on the list of contributories on the ground that he was still liable to any future calls for payment of the liabilities of the company. Sir Malins, V. C., held that as the shares were sold by him to the liquidators after the transfer he ceased to be a member of the company and his name must, therefore, be taken off the list of contributories. The Court of Appeal reversed the decision of the Vice-Chancellor and held that under section 161 the liquidators had no power to release the dissentient shareholder from his liability to the creditors but only to purchase such interest as he had in the assets of the company and consequently that the shareholder's name must be put on the list of contributories.

1. L.R. (1901) 1 Ch. 279.
2. L.R. (1948) 1 K.B. 116 at 122.
3. (1870) L.R. 6 Ch. A.C. 96.

The following observations of Sir Mellish, L.J., at page 102 must be understood in the context of the actual points which arose for decision in that case. He said :—

"The section says that a dissentient shareholder may give notice to the company "either to abstain from carrying such resolution into effect, or to purchase "the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned." What is the meaning of the words "purchasing the interest held by such dissentient member ?" Does it mean purchasing his shares and having them transferred ? Surely it would have been easy for the Legislature to have said, "and to purchase the shares of the dissentient member," if that is what they meant. But what they say is "to purchase the interest held by such dissentient member ;" that is to say, to purchase the interest which a shareholder of the company has in the assets of the company that company being in the course of being wound up. The shareholder has still an interest in the assets of the company. He is entitled to a share in whatever surplus there may be."

Further on, the significance of these observations is brought out by the following subsequent passage :—

"I am of opinion that by the 161st section, all that is contemplated is, that the interest of the shareholders in the company that is being wound up should be sold, and the purchase-money of it paid, but that it is not contemplated that the shares themselves should be transferred."

These observations do not carry us very far because they do not support the basis of the arbitrator's award, namely, the award of a proportionate share of the estimated value of the net assets of the company as the value of the interest of the shareholders.

Mysore West Gold Mining Company, In re[1], the only question which directly arose was whether a commission could issue for the examination of witnesses abroad pending a reference to arbitration for the ascertainment of the price to be paid for the purchase of the interest of a dissentient member under section 162 of the Companies Act, 1862 corresponding to section 208-C of the Indian Companies Act, 1913. The Mysore West Gold Company passed a resolution to wind up voluntarily and for the sale and transfer of its business and property to a new company. By agreement between the liquidator of the said Mysore West Gold Company and the new company it was agreed *inter alia* that three of the shares of the new company were to be given in respect of two fully paid-up shares in the old company. The holders of certain shares in the old company served on the liquidator notice of dissent from the scheme calling upon the liquidator either to abstain from carrying into effect the resolution for reconstruction or to purchase their interest at a price to be determined by arbitration. The arbitration was commenced and during the course of the arbitration for the purpose of ascertaining the value of the company's assets which consisted of gold mines in India and shares in another company having gold mines in India, the liquidator took out summons for liberty to issue a commission to India for the examination of witnesses there. It was held by Chitty, J., that the Court had jurisdiction to order such a commission. In the course of his judgment Chitty, J., dealt with an argument that the liquidator must value the interest of the dissentient member according to the valuation which had been made in the agreement between the old company and the new company of the interest of the other non-dissentient members thus :—

"Now I think that the fact of such a valuation being the basis upon which a re-construction has been effected is to be carefully considered and to have due weight given to it, but it is not in itself conclusive so as to fix the proper price which the liquidators should pay in respect of the interest of a dissentient member. Where a new company is purchasing the assets of a company in liquidation and the new company brings new capital into the concern, it does not at all follow that the price per share as fixed between the company in liquidation and the new company forms the true price which has to be determined by the arbitration.

It is often worth a man's while if he has capital to buy a concern which had come to a standstill for want of capital ; he might give what after all was a fair price as between vendor and purchaser, but much more than the breaking-up price obtainable in the market. The dissentient member cannot ask for a valuation as between vendor and purchaser, because the company, so far as he is concerned, has come to an end, and he is in the position of a man who has not got capital wherewith to buy the concern which has come to a standstill for want of capital."

We are unable to derive much assistance from this case either except to the extent that the value of the assets of the company would have a material bearing on the value of the interest of the dissentient member.

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1. (1889) L.R. 42 Ch.D. 535.

What should not be overlooked is that under section 208-C (3) what the arbitrator has to determine is the price at which the interest of the dissentient members should be purchased by the liquidator. The price assumes a sale at least notionally. The market may be hypothetical. Danckwerts, J., explained in *Holt* v. *Inland Revenue Commissioners*[1], that a market is to be assumed from which no buyer is excluded and at the same time the Court must assume a prudent buyer who would make full inquiries and have access to accounts and other information which would be likely to be available to him. In the words of Wyn Parry, J., in *Re Press Caps Ltd.*[2].

" a valuation is only an expression of opinion. It may be made on one of a number of basis but the final test of what is the value of a thing is what it will fetch if sold ".

In fixing the price of a dissentient member's interest the arbitrator certainly will have to take into account the assets of the company and its liabilities but he will have to take into account several other factors as well. It is not necessary for disposing of these appeals to give an exhaustive list of such factors. Indeed Balakrishna Iyer, J., after mentioning a few such factors concluded by saying that they were not exhaustive. It is sufficient for the disposal of these appeals to say that the basis of the Aribtrator's first award was totally wrong in law, namely, the determination of the price by dividing the estimated market value of the net assets of the company by the number of ordinary shares. Adopting that basis he has practically equated the position of a shareholder to that of a tenant in common along with the other shareholders in respect of the company's assets. Balakrishna Iyer, J., was, therefore, justified in remitting the award back to the Arbitrator for reconsideration in as much as the award which the Arbitrator had made was vitiated by the adoption of a wrong legal basis in fixing the price of the interest of the dissentient members.

If the order of remittal was valid and proper Mr. Gopalaswami Iyengar did not contend that he should ask the Court to set aside the revised award on any of the grounds mentioned in section 30 of the Arbitration Act. That award, therefore, stands and so will the decree which followed that award. The appeals fail and are dismissed with costs.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Nammalwar and others .. *Appellants**

v.

Appavu Udayar and others .. *Respondents.*

Will—Construction—Gift to unborn son and charity—Gift to charity—Whether conditional or substitutional—Succession Act (XXXIX of 1925)*, section* 130*—Applicability—Gift to unborn son failing because of the rule in Tagore Case—Intestacy—Hindu Transfers and Bequests Act (I of* 1914)*, section* 2 (2)*—Scope—Validation of gifts in favour of unborn persons.*

A testator executed a will in 1885 and a codicil on 31st July, 1902 and died on the same date. Briefly the provisions in the codicil modifying the will were that his widows should after his life time take both the *A.* & *B.* Schedule properties for their lives without powers of alienation. If any of his daughters should beget a male heir, all the properties should go to that male heir. In case no such male heir was born all the properties should go to a charity. A grandson was born in 1912, before the dates on which Madras Act I of 1914 came into force. On a construction of the will.

Held : The gifts in favour of the grandson and in favour of the charity are not independent gifts. The gift in favour of the charity is a conditional gift, the specific condition being that there should be no male child born to any of the daughters of the testator who could take at the date of the death of

1. (1953) 2 All Eng. L.R. 1499, at 1501.

2. (1949) All E.R. 1018.

*Appeal No. 663 of 1954.

11th July, 1959.
(20th Asadha, 1881—Saka.)

the testator. The gift in favour of the charity is not therefore substitutional but is clearly a conditional gift, the condition being the absence of any male grandson of the testator through his daughters. The gift in favour of the charity could therefore take effect only if the gift in favour of the grandson failed in the particular manner indicated by the testator. The gift in favour of the grandson failed, not because there was no grandson to take the gift but because of the rule in the *Tagore Case*, (1872) 9 Bengal L.R 377: I.A. (Supp.) 47. Consequently, it is section 130 of the Succession Act applied and on intestacy consequent upon the failure of the gift in favour of the grandson, the grandson will take the property as the heir-at-law after the widows.

The grandson was born in 1912, even before the date when the Madras Act I of 1914 came into effect. Under the provisions of the codicil the moment the grandson was born the life estate given to the widows would terminate and the properties had to vest before the Act came into effect. Section 2 (2) of the Madras Act I of 1914 would not validate the gift in favour of the unborn grandson.

Mrs. Manekshaw v. *Motishaw*, (1956) S.C.J. 704 : (1956) S.C.R. 591 : (1956) 2 M.L.J. (S.C.) 67 and *The Official Assignee of Madras* v. *Vedavalli Thayarammal*, (1925) 51 M.L.J. 182, referred.

Appeal against the Decree of the Court of the Subordinate Judge of Tiruchirapalli in O.S. No. 128 of 1950.

R. Ramamurthi Ayyar and *T. R. Venkataraman*, for Appellants.

A. V. Narayanaswami Ayyar, *R. Subramania Ayyar* and *S. Ponnuswami*, for Respondents.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This appeal against the dismissal of O.S. No. 128 of 1950 on the file of the Subordinate Judge's Court, Tiruchirapalli, is by the plaintiffs. The suit was laid against 32 defendants for declaration that the properties described in the Schedules to the plaint belonged to the Trust specified in the will of one Appavu Udayar who died on 31st July, 1902. The further reliefs claimed in the plaint were recovery of possession of the alienated properties from the alienors and restoration of possession to the first defendant or to such other person as the Court might deem fit for and on behalf of the Trust and recovery of mesne profits at Rs. 10,000 per annum. The case in the plaint is that the properties described in Schedules *B* and *C* to the plaint blonged to Appavu Udayar who executed a will on 17th September, 1885, bequeathing them to a Trust for feeding 10 Brahmins every day in a house bearing Door No. 211, North Chitrai Street, Srirangam, belonging to him. The three widows of the testator who survived him were appointed trustees of the charities for their lives. The first defendant to the suit was the only surviving widow of the testator on the date of plaint. The second defendant in the suit is the son of a daughter of the testator. On the date of the will, the testator had only one daughter, Annapoornam, by his wife Minakshi. The testator is said to have executed, according to the contesting defendants 1 and 2, a codicil, Exhibit B-27, on 31st July, 1902, by which he materially altered the dispositions made by his will. The truth and genuineness of this codicil are not admitted by the appellants. The second defendant was not born on the date of the will or codicil of the testator, but was born only in 1912. The first defendant was not in possession of any of the suit properties as she and her co-widow, Minakshi, are said to have relinquished their interest in the testator's properties in favour of defendant 2 even in 1930 by the release deed Exhibit A-2. Defendant 2 is said to have alienated many of the trust properties in favour of the other defendants to the suit. The first plaintiff and another applied to the Advocate-General, Madras, in 1949, for sanction being granted under section 92, Civil Procedure Code, to file a suit in respect of the suit charity. The Advocate-General refused sanction on the ground that there was no charity in existence.

The defendants raised various pleas which are covered by the twelve issues framed in the suit. The principal issues were that no valid trust had been created by the will of Appavu Udayar, that the codicil had revoked the provisions of the will of 1885, that the bequest in favour of the charity was void and consequently there was intestacy and the second defendant as the grandson of the testator became entitled to all the properties, and the alienees had acquired title by adverse posession and the suit was barred by limitation.

The learned Subordinate Judge upheld the genuineness of the codicil, and, construing it, he held that the gift in favour of the charity was void and inoperative. He even held that there was no valid bequest in favour of any charity either by the will or by the codicil and that the suit was barred by adverse possession and limitation. On these findings, he dismissed the suit.

Mr. R. Ramamurthi Ayyar, learned counsel for the appellants, stressed two points before us. The first related to the genuineness of the alleged codicil, Exhibit B-27. The second related to the construction of the will as modified by the codicil.

Appavu Udayar died on 31st July, 1902. That is the date on which he is said to have executed the codicil on the back of the registered will, Exhibit A-1. Nobody questions the genuineness of the will. It is said that all the attestors to the codicil—there are three of them—were dead on the date of the suit. The writer also was dead. This fact is not disputed. The document Exhibit A-1 on the back of which is written the codicil, was produced by the Land Mortgage Bank, Tiruchirapalli, with whom the second defendant had lodged it in connection with a transaction which he had with the Bank. The document is certainly more than 30 years old and it has been produced from proper custody. Under the circumstances, the presumption arising under section 90 of the Evidence Act can be drawn as to the due execution of the document and attestation of it. The only two circumstances relied on by Mr. Ramamurthi Ayyar as negativing the presumption are that the codicil was not published till 1930, when for the first time it is mentioned in the surrender deed, Exhibit A-2, and the document was not executed on a separate piece of paper, but appears to be endorsed on the last page in the will. Neither of them, in our opinion, is sufficient to rebut the presumption arising under section 90 of the Evidence Act. From 1902 till 1930, both the widows and the grandson of the testator have been dealing with the properties without any protest on the part of anybody by way of creating sales and mortgages. They did not acknowledge the title of the Trust at any time after the testator's death. They dealt with the properties as the heirs-at-law of the testator. Consequently, there was no occasion to mention the codicil in any of these alienations till 1930. There was a litigation in 1930 with reference to a property left by the testator in O.S. No. 48 of 1930 in the Sub-Court, Tiruchirapalli, which was a suit laid by a mortgagee. The second defendant was the defendant in that suit and he was contesting it. In connection with this suit, the surrender deed, Exhibit A-2, was executed. Mention had to be made in that deed of the will of Appavu Udayar and of the unregistered codicil. The widows did not claim properties under the will or codicil because, they asserted in Exhibit A-2 that they obtained the properties as the heirs of their husband. They mentioned the codicil in Exhibit A-2 only by way of enumerating the properties which they obtained from their husband. Obviously, there was nothing in 1950 which suddently induced the widow or the second defendant to fabricate a codicil for the purpose of effectuating the surrender deed. The object could have been achieved without bringing into existence any false document on the back of the last page of the will. We see therefore nothing suspicious in the codicil being published for the first time only in 1930. The other circumstance that the codicil was not written on a separate sheet of paper and was not registered deserves no consideration. We entirely agree with the learned Subordinate Judge that the codicil is a true document which was executed by the testator and duly attested as required by law.

The next contention of Mr. Ramamurthi Ayyar is that the learned Subordinate Judge went wrong in entirely ignoring the dispositions made under the will on the assumption that the codicil displaced those dispositions. He maintained that the codicil merely modified the dispositions made by the will in one respect, and that, both under the will and the codicil, the gift to the charity was affirmed. His argument was that there was an overriding intention of the testator expressed both in the will and the codicil to give the properties described in the *B* Schedule to the will to the charity, and that the only alteration made in the codicil was the substitution of the daughter's son for the daughter in respect of the bequest of the properties described in *A* Schedule to the plaint. To understand this and the further argument

of Mr. Ramamurthi Ayyar, we would set out in brief the provisions of the will and the codicil.

The scheme in the will is that the properties of the testator are divided into two Schedules,—*A* and *B*. The *A* Schedule properties are given to Annapoornam, the daughter of the testator by one of his wives, Minakshi. That daughter was then alive. The testator provided that, if he should beget other daughters by his wives, such daughters should be got married suitably by Annapoornam. Those daughters however did not take any share in the *A* Schedule properties by the terms of the will. *A* Schedule properties were given by a subsequent clause to the three widows of the testator and the gift to Annapoornam was directed to take effect after the lifetime of the three widows. After Annapoornam's lifetime, the *A* Schedule properties were given to her heirs, and, if she had no heirs, these properties were to be added to the *B* Schedule properties which were given to the charity. The testator gave the *B* Schedule lands and properties to charity and directed that the charity should be performed by his widows and, after their lifetime, by Annapoornam and her husband. Over one item of nanja land included in the *B* Schedule, the testator made provision for maintenance of Seeniammal, the widow of his predeceased son. Finally, both the bequests in favour of Annapoornam and the charity were to stand cancelled in case the testator begot a son. For seven years after his death, the testator directed the *A* and *B* Schedule properties should be enjoyed by his widows, and, if they should die within that period, by Annapoornam, and, out of the income, the debts of the testator amounting to Rs. 3,000 should be discharged. Till such debts were discharged the charity had no claim over the income during that period. Thereafter, even if the debts were not fully discharged, the income from the *B* Schedule properties should be utilised for the conduct of the charity.

After the execution of the will and before the date of the codicil, Annapoornam had died. The testator had begotten two other daughters by his wife, Minakshi, and one of them, Nagaratnammal, is the mother of the present second respondent (second defendant). Since the gift in favour of Annapoornam given under the original will could not take effect as she had already died, the testator had to make fresh provisions by his codicil. He directed by his codicil that his three widows should after his lifetime take both *A* and *B* Schedule properties for their lives without power of alienation. The wives should maintain the daughters and get them married and keep the sons-in-law in the family itself. If any of his daughters should beget male heir, all the properties of the testator should belong to that male heir. Till that male heir attained majority, all the wives of the testator should be his guardians. In case no male heir was born to any of his daughters, all the properties of the testator should go to the charity mentioned in the will.

Reading the will and the codicil together, we are unable to find any overriding intention of the testator to give his properties to the charity irrespective of any contingency. A reasonable construction of the will and the codicil would be to hold that the testator's intention to give the properties to the charity was conditional upon none of his daughters begetting a male child. We do not therefore agree with Mr. Ramamurthi Ayyar that there is an overriding intention on the part of the testator to make a bequest both under the will and the codicil to the charity and that the construction of the will should be such as to give effect to this intention.

The conclusion of the learned Subordinate Judge that the bequests made under the codicil failed and there was an intestacy is attacked by Mr. Ramamurthi Ayyar mainly on the ground that the gift to the charity is only a substitutional gift and not a conditional gift. We do not agree. The following clause in the codicil

> "should any of my daughters beget male heir, my aforesaid entire properties should belong to that male heir,"

is not capable of any dubious meaning. The first bequest is in favour of the three wives of the testator for their lives. Of course, this bequest is terminable on the birth of a son to any of the daughters of the testator. Mr. Ramamurthi Ayyar contends that the gift in favour of the grandson was a void gift, because it offended the rule in the *Tagore case*[1], and even though the prior bequest

1. (1872) 9 Beng. L.R. 377: I.A. (Supp.) 47.

failed not in the manner contemplated by the testator, under section 129 of the Succession Act the subsequent bequest in favour of the charity should take effect. For this purpose, he relied on the decision of the Supreme Court in *Mrs. Manekshaw v. Motishaw*[1]. There, a Parsi testator gave all his properties to his adopted mother and also to her heirs. The husband of the mother had attested the will, and, consequently, the gift in her favour was void under the provisions of section 67 of the Indian Succession Act. The question arose whether, on the failure of the gift to the adopted mother, any intestacy intervened, or, on a true construction of the will, there was a substitutional bequest in favour of the heirs of the adopted mother. The mother had two daughters on the date of the death of the testator. The question posed for consideration by the Supreme Court was the construction of the will to ascertain whether there was a single bequest to Shirinbai, the adopted mother, as contended by the respondents, or, whether there was also a substituted bequest to take effect on the failure of the bequest to the mother, as contended by the appellants. The Supreme Court ruled that if there was no substitutional bequest neither section 129 not section 130 of the Indian Succession Act would be called into play. But the Supreme Court construed the will as containing a substitutional bequest in favour of the heirs of the adopted mother, and, in the circumstances that had happened, section 130 of the Succession Act would not apply and section 129 alone would apply. Section 129 is in the following terms :—

"Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator."

Section 130 runs this :—

"Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner."

On the construction of the will in that case, the Supreme Court having ruled that the will did contain a substitutional bequest in favour of the heirs of the adopted mother, the further question whether section 129 or section 130 applied had to depend equally on the terms of the will. The facts of the case before us have no resemblance to the facts in the Supreme Court decision. Here, the gifts in favour of the grandson and in favour of the charity are not independent gifts. Nor could they be considered substitutional gifts. Clearly, the gift under the will in favour of the charity and any gift which can be spelled out in its favour under the codicil is a conditional gift, the specific condition being that there should be no male child born to any of the daughters of the testator who could take at the date of the death of the widows of the testator. The gift in favour of the charity is not therefore substitutional, but is clearly a conditional gift, the condition being the absence of any male grandson of the testator through his daughters. The gift in favour of the charity could therefore take effect only if the gift in favour of the grandson failed in the particular manner indicated by the testator. Here, the gift in favour of the grandson failed, not because there was no grandson to take the gift, but because of the rule in the *Tagore case*[2]. Consequently, it is section 130 of the Succession Act that applies and the second bequest cannot take effect since the first bequest did not fail in the manner indicated by the testator.

The argument of Mr. Ramamurthi Ayyar that the gift in favour of the grandson was void and could not take effect was answered by Mr. A. V. Narayanaswami Ayyar, counsel for the respondents, by relying on the provisions of Madras Act I of 1914. Section 2 (2) of that Act runs thus :—

"In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration, in whom the right to any property has vested prior to the date of the Act."

The Act came into force on 14th February, 1914. It was intended to declare the rights of persons governed by the Hindu Law to make testamentary transfers

1. (1956) S.C.J. 704 : (1956) S.C.R. 591 : (1956) 2 M.L.J. (S.C.) 67.
2. (1872) 9 Beng.L.R. 377 : I.A. (Sup.) 47.

and bequests in favour of unborn persons, which right had been denied by the decision of the Privy Council in the *Tagore case*[1]. The argument was that a life estate had been conferred upon the widows and a grandson had come into existence before the termination of the preceding life estate, and, since the time of distribution was indicated in the will to be only after the termination of the life of the widows and the grandson was alive to take at the time of distribution, clause (2) of section 2 of Act I of 1914 rendered the gift in favour of the grandson valid. This argument found favour with the learned Subordinate Judge. The second defendant had been born even in 1912, that is, before the date when Madras Act I of 1914 came into effect. Under the terms of the codicil, the life estate given to the widows is to terminate on the birth of a son to any of the daughters. Therefore, the moment the second defendant was born in 1912, the life estate of the widows terminated and the properties vested in the second defendant. We are unable to see how the time of distribution could be postponed after the birth of a grandson. It is true that the widows of the testator are appointed guardians of the grandson ; but, that would not have the effect of postponing the time of distribution.

This question has been considered in two decisions of this Court—*Venkayamma* v. *Narasamma*[2] and *Sivarama Ayyar* v. *Gopalakrishna Chettiyar*[3]. In construing the terms of the will in the former case, the Court held that the disposition in favour of the unborn heirs was to take effect after the coming into force of Madras Act I of 1914. But, in the latter case, it was held that the vesting in the unborn son under the terms of the will was before the Act, and since the devisee did not live upto the termination of the preceding estate nor even upto beyond the date of the passing of the Act so as to give an opportunity for the Act to operate upon his contingent and void estate and convert it into a vested and valid estate, the Act did not apply. In the case before us, though the vesting was before the Act, the devisee lived upto the commencement of the Act. That is, of course, one difference. But the decision in *Sivarama Ayyar's case*[3] is no authority for the contention that merely because a devisee had lived upto the commencement of the Act even when the vesting had taken place before the commencement of the Act, the disposition would be made good by the application of the provisions of Act I of 1914. To accede to the argument of the learned counsel for the respondents would mean to write a new will for the testator, that is to say, to provide for the vesting of the estate in the grandson after 1914 and not as soon as the grandson was born in 1912. We therefore reject the argument of learned counsel for the respondents that Madras Act I of 1914 validated the gift in favour of the unborn grandson.

Mr. Narayanaswami Ayyar, learned counsel for the respondents, maintained that the decision in the *Tagore case*[1] itself was wrong, and, in support of this opinion, he cited many text-book writers. We are relieved of the necessity of examining this point, as, in our view, even on intestacy consequent upon the failure of the gift in favour of the grandson, the grandson (Respondent 2 before us) takes the property as the heir-at-law after the widows.

Our view that there was an intestacy in this case consequent upon the failure of the gift in favour of the grandson is supported by a Bench decision of this Court in *The Official Assignee of Madras* v. *Vedavalli Thayarammal*[4]. There, the testator had given the whole of his residuary estate to his grandson or sons who might be born or would be born to his son *S* within ten years after his death. If there were no such grandsons, the residuary estate was directed to be divided equally between his granddaughters after the death of his wife. By a codicil, the distribution of the estate among the granddaughters was postponed till after the death of his wife, his son and daughter-in-law. The testator died in 1887, leaving a widow, son and three granddaughters. A grandson was born in 1889. On a construction of this will, it was held that the bequest in favour of the grandson born in 1889 after the death of the testator was invalid under the rule in the *Tagore case*[1] that as the will provided that the gift-over to the granddaughters was to take effect only if there

1. (1872) 9 Beng. L.R. 377 : I.A. (Supp.) 47.
2. (1916) 31 M.L.J. 33 : I.L.R. 40 Mad. 540.
3. (1924) 47 M.L.J. 337.
4. (1925) 51 M.L.J. 182.

was no grandson born within ten years of the testator's death but a grandson was actually born within ten years, the case fell within section 117 of the Indian Succession Act, corresponding to the present section 130, and the gift-over would not take effect, and the result was an intestacy. Ramesam, J., in his separate concurring judgment, supported the finding of the failure of the first upon the additional ground that there was an interval after the testator's death, during which the estate was not vested in any person. On this ground, he held that the disposition in favour of the grandson was void and consequently the disposition in favour of the granddaughters also was void. This ground of the decision cannot be held to be impliedly overruled by the decision of the Supreme Court in *Mrs. Manekshaw* v. *Motishaw*[1]. We agree with the learned Subordinate Judge that there was an intestacy in this case, even though we do not agree with him that the gift in favour of the grandson was validated by the provisions of Madras Act I of 1914. The result is that there was no valid gift in favour of the charity, which could take effect.

It is unnecessary in this view to consider the other questions whether the bequest in favour of the charity was ineffective for any reason like the charity not having come into existence on the death of the testator or the widows having repudiated the charity, or because of the provisions in the will regarding the gift in favour of the charity being inchoate. It is also unnecessary for the disposal of this appeal to consider the question whether the suit fails by reason of limitation or adverse possession. However we fail to understand the observations of the learned Subordinate Judge that the alienors and the widows had prescribed title by adverse possession. The widows and the second defendant were in the position of trustees of the charity if there was a valid creation of a Trust under the will. Consequently their possession could never be adverse to the Trust. In view of the admitted fact that the widows and the second defendant had consistently denied the charity, we fail to see against whom the alienors could acquire title by adverse possession. Anyway, to support the decree of the lower Court it is not necessary to agree with the conclusions of the lower Court upon these questions of limitation and adverse possession. On our finding that the bequest in favour of the grandson failed, and consequently, even if there was a valid bequest in favour of the charity under the will and the codicil, that also failed and an intestacy followed, the suit must necessarily be dismissed.

The appeal is dismissed with the costs of the contesting respondents.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

S. Sankaranarayana Ayyar (died) and others .. *Appellants**

v.

Lakshmi Ammal and others .. *Respondents.*

Hindu law—Widow—Maintenance—Power of Court to vary rate fixed by a prior decree—Scope—Period anterior to date of subsequent suit—Right to arrears at enhanced rate.

It is true that the rate determined by a prior decree for maintenance in favour of a Hindu widow must prevail unless it is varied but this does not necessarily imply that a Court has no power to vary that rate from a period anterior to the date of the suit brought for the variation. That would entirely depend upon the time from which the changed circumstances have prevailed, the reasonableness of the claim of the maintenance-holder to an enhanced allowance, the existence or absence of demand and refusal, etc.

Case-law discussed.

Appeals against the Decree of the Court of the Subordinate Judge, Tirunelveli, in O.S. No. 39 of 1954.

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1. (1956) S.C.R. 591 : 1956 S.C.J. 704 : (1956) 2 M.L.J. (S.C.) 67.

*Appeal Nos. 462 and 492 of 1955. 16th November, 1959
(25th Kartika, 1881—Saka).

R. Ramamurthy Ayyar and *R. Ramachandran*, for Appellants in Appeal No. 462 of 1955 and Respondents 2 to 4 in Appeal No. 492 of 1955.

P. N. Appuswami and *T. R. Sundaram*, for Respondent in Appeal No. 462 of 1955 and Appellant in Appeal No. 492 of 1955.

P. S. Chandrasekhara Ayyar and *P. S. Ramachandran* for 2nd and 3rd Respondents in Appeal No. 462 of 1955 and 5 and 6th Respondents in Appeal No. 492 of 1955.

The Judgment of the Court was delivered by

Anantanarayanan, J.—A.S. No. 462 of 1955 is an appeal by defendants 1 to 6 in the Court below in a suit instituted *in forma pauperis* by a Hindu widow for recovery of arrears of maintenance, and for enhancement of maintenance and raiment allowance. A.S. No. 492 of 1955 is an appeal by the widow upon grounds that she ought to have been granted enhanced maintenance and raiment allowance as prayed for. In this appeal, there is a memorandum of cross-objections filed by respondents 5 and 6, particularly objecting, *inter alia*, to any enhancement of maintenance from the date of demand by the widow (15th December, 1945), as decreed by the learned Additional Subordinate Judge of Tirunelveli.

The background of facts may be briefly set forth as follows: One Sri V. Subbuswami Ayyar was a vakil of Vannarpet who had extensive properties, and he died in 1905 leaving a very rich estate. His four sons were Subramania Ayyar, Srinivasa Ayyar, Ramachandra Ayyar and Sankaranarayana Ayyar (first defendant). Ramachandra Ayyar died without issue on 1st July, 1919 leaving his widow Lakshmi Ammal (the present plaintiff): Subramania Ayyar died on 28th February, 1922, again without children, but leaving two widows behind him. Defendants 1 to 4, of whom the first defendant died *pendente lite* constituted the branch of Sankaranarayana, and defendants 5 and 6 similarly constituted the branch of Srinivasa Ayyar, who himself died in 1949. In 1924, Lakshmi Ammal (the present plaintiff) and the two widows of Subramania Ayyar, instituted claims for maintenance, and the relevant suits were O.S. Nos. 23, 35 and 39 of 1924. Those decrees of the learned Additional Subordinate Judge of Tirunelveli came up on appeal to the High Court, and the assets and income of the family at that time, as well as the principles upon which the widows ought to be granted maintenance and the quantum of maintenance to be determined in their cases, were dealt at length by the judgment of the Bench, Wallace and Tiruvenkatachariyar, JJ., in *Srinivasa Ayyar* v. *Lakshmi Ammal*[1]. We shall have occasion, subsequently, to refer to the facts as found in that judgment. It is sufficient here to state that the present plaintiff sent notices to the first defendant and his brother on 15th December, 1945, intimating them of changes in circumstances, both with regard to the increased value of assets and income, and also with regard to the sharp increase in costs of living, and claiming enhanced maintenance. Taking all the relevant factors into consideration, the plaintiff claimed in the present suit maintenance at Rs. 250 *per mensem* and a sum of Rs. 250 *per annum* as raiment allowance. The learned Subordinate Judge has now granted the plaintiff Rs. 150 per mensem instead of Rs. 100 per mensem which was the amount allowed in the previous litigation, from 15th December, 1945 (the date of her demand) till 31st December, 1953, the future maintenance of Rs. 150 per mensem with raiment allowance of Rs. 150 per annum, together with a charge in respect of these claims upon the estate.

In *Srinivasa Ayyar* v. *Lakshmi Ammal*[1] already referred to, the nature of assets held by this family, and the estimate of the annual income, are matters dealt with at some length. It is to be noted that even in that litigation of the year 1924, the Subordinate Judge who tried these suits for maintenance estimated the annual income as about Rs. 30,000. The High Court observed that the right to maintenance should be determined in such cases-

1. (1927) 54 M.L.J. 531.

" having regard to the extent of the assets of her husband taken over by his successor. . . . . Each case has to be decided upon its facts. Where the assets of the husband which have been taken over are comparatively small, it has been held that the widow may be awarded even the whole of the income from her husband's share as it was at the time of his death. But in other cases, there is no fixed ratio between the income derivable from the husband's share and the proportion thereof which should be awarded to her for her maintenance. All that is required is that the allowance ought to be such as to enable her to live in comfort having rega d to the means of the family. Such being the rule, it is not in our opinion open to the coparceners of her deceased husband, who have taken his properties by survivorship, to prescribe any arbitrary standard as regards the comforts the widow is entitled to have, or the style in which she should live ".

We must here emphasise that the High Court came to the conclusion, even in *Srinivasa Ayyar* v. *Lakshmi Ammal*[1] which related to estimates of 1924, that the learned Subordinate Judge then arrived at a fair approximation of the average annual income of this family.

In *Ekradeswari* v. *Homeshwar*[2] the Privy Council pointed out :

" Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and the mode of living, and to the age, habits, wants and class of life of the parties."

In the present matter, this action for increased maintenance by the plaintiff was strenuously contested by defendants 1 to 4 and defendants 5 and 6, upon grounds that the assets of the family had dwindled owing to failure to realise outstandings, and also owing to meagre compensation given by Government for estates taken over, while the wants and necessities of the other branches, particularly of first defendant's branch, had increased. The plaintiff contended that the assets were not merely intact, but were far more substantial, being in the shape of properties rather in the shape of outstandings, which was the situation in 1924. The income was estimated by the plaintiff at about Rs. 60,000 per annum. The learned Subordinate Judge came to the conclusion that the income was certainly not less than Rs. 30,000 per annum, and could probably be a little more. As regards cost of living, he has gone into the cost of living index figures which were made available to Court, and observed that these figures registered a sharp increase of over 300 per cent. from 1935 to about 1952. He has further observed that the cost of living index of 1924-25 was unlikely to have been materially different from, or appreciably higher than, the index figures of 1930 to 1939. Upon his own findings, the annual income which could have been derived and enjoyed by the husband of the plaintiff, if he were alive, would be about Rs. 7,500 . In that context, the claim of the plaintiff for enhanced maintenance aggregating to Rs. 250 per mensem and raiment allowance of Rs. 250 for the year, would still be less than 50 per cent. of the share of her husband. Neverthelss, the lower Court granted the plaintiff only the rates that we have already referred to, while the difference between the previous decreed rate and the present rate has been granted as arrears of maintenance from the date of the plaintiff's demand (15th December, 1945) to 31st December, 1953. The question before us, therefore, is whether the estimate of assets and income by the learned Subordinate Judge is correct, and whether the plaintiff is entitled to further reliefs in these appeals.

We might immediately state that we are satisfied, from a careful consideration of the data available in this suit, that the estimate of the learned Subordinate Judge errs, if at all, in being somewhat conservative. Though the defendants strenuously contended that the assets had shrunk, and the income was relatively precarious, the first defendant throughout declined to make a clean breast of the actual particulars of income, item by item. He even declined to file an affidavit regarding his assets and income, and certain accounts filed in the suit were found by the learned Subordinate Judge to be unsatisfactory, and he was sceptical about them. The learned Subordinate Judge also found that debts to the tune of Rs. 50,000 or 60,000 con-

1. (1927) 54 M.L.J. 530.
2. (1929) 57 M.L.J. 50 : I.L.R. 8 Pat. 840 : L.R. 56 I.A. 182 (P.C.).

tracted by first defendant, were so incurred in order to acquire further properties, and to increase the estate. Mr. K. Rajah Iyer for the plaintiff has drawn our attention to certain undeniable facts, which clearly point to the true state of affairs. Thus, the Kayathar properties alone comprised 128.91 acres of nanja and 507 acres of punja, while the Avanaperi properties are capable of yielding 7½ kottas. Of the compensation of Rs. 2,36,000 for the Elavarasanandal, etc., villages acquired by Government, Rs. 1,18,000 has been paid, and it is not as if the payment of the balance cannot be confidently anticipated. The Vannarpet house has been estimated at Rs. 1,50,000 in value, from avilable data, and an estimate of Rs. 1,00,00. at least would appear to be justified, even from a conservative point of view. The total annual income computed upon these data exceeds Rs. 60,000 which is the estimate by plaintiff and her brother-in-law Sitarama Ayyar (P.W. 2). At the least, therefore, the share of the annual income which could have been derived by the coparcener representing this brauch, namely, plaintiff's husband, would appear to be Rs. 7,500 per annum. This, as we have earlier observed, would certainly justify the award of maintenance at the enhanced rate now claimed, that is, Rs. 250 per mensem and Rs. 250 per year as raiment allowance. Nevertheless, the learned Subordinate Judge granted only Rs. 100 per mensem as maintenance and Rs. 100 a year for clothing.

The learned Subordinate Judge rightly emphasised that the fact that the number of defendants in the branch of the first defendant had increased, was no criterion in assessing the maintenance payable to plaintiff. As he observed, the fact that commitments have increased in the branch of one coparcener, is no ground at all for giving diminished relief with respect to the claim for maintenance by the widow of another coparcener, so long as she is claiming only a reasonable proportion of her husband's share of the income. Actually, we note that Srinivasa Aiyar and Sankaranarayana Aiyar became divided even by the time of this suit, and that those branches are separate. The plaintiff is the daughter of a retired Deputy Collector, who left substantial properties. She was married into a very rich family, and she had the misfortune to lose her husband even prior to the consummation of marriage. She is accustomed to a life of some decency and comfort, and her claim commends itself to us that her allowance for maintenance should be proportionate to these circumstances, enabling her to have one or two servants to look after her in middle, age. Privation *per se* is no virtue, and, while a Hindu widow is certainly expected to live a chaste life, which is further not extravagant or disproportionate to the means and income of her late husband, we are quite unable to concede that austerity or asceticism should be rightly expected of her by the coparceners of her deceased husband. With regard to the cost of living indices, the facts speak for themselves, and we must certainly take judicial notice of the fact that, with prevailing prices, even an allowance of Rs. 250 per mensem may not at all imply any very great standard of life, considered relatively with regard to the wealth and background of this family. There is absolutely nothing in the evidence to reinforce the suggestion of the defendants that the plaintiff was really claiming more, in order to enrich her sister, her brother-in-law (P.W. 2) and the children of that family. On the contrary, it is clear that the defendants never made a true disclosure of the value of the assets and income, and the income probably exceeds the estimate arrived at by the trial Court.

We have therefore no hesitation in concluding that the appeal of the plaintiff must be allowed upon this aspect, and that she is entitled to increased maintenance at the rate of Rs. 250 per mensem, and to Rs. 250 per year for clothing as claimed by her.

With regard to the enhanced maintenance decreed by the Lower Court at the difference between the previous rate and the rate decreed in suit, for the period 15th December, 1945 to 31st December, 1953, more or less as constituting arrears of maintenance, it is strenuously contended that this is illegal. The contention may be put in the following form. Since the previous rate was granted by a decree

of Court, it is the rate governing the parties, unless it is varied by another decree, or unless the decree bears, on its own face, provision for varying the rate in accordance with changed circumstances, or a machinery for determining this. In such a state of affairs, the defendants are not liable for any arrears, since they satisfied the claim of the plaintiff for maintenance at the reduced rate decreed for the period prior to suit, even though the plaintiff might have made a demand on 15th December, 1945. The decisions upon which this proposition is sought to be maintained, as a question of law, are (1) an early decision in *Sreeram Bhuttacharjee* v. *Puddomookhee Debis*[1], (2) the decision of Wadsworth, J., in *Veerayya* v. *Chellamma*[2], where this early decision has apparently been followed, (3) a Bench decision of the Nagpur High Court in *Trimbak* v. *Bhagu Bai*[3], which does not really relate to the matter in the form in which it now presents itself, and (4) the decision of the Nagpur High Court in *Savitribai* v. *Radhakisan*[4], where alone an observation is to be found to the effect, that in a suit for variation of maintenance claim, the enhancement can take effect only from the date of the suit, and cannot affect the question of arrears.

The matter appears to merit careful scrutiny, particularly as we find that no clear line of reasoning upon this aspect is evident in the authorities which have been cited. Again, of these authorities, the decision of the Nagpur High Court in *Savitribai* v. *Radhakisan*[4] is alone in point, and we shall now proceed to analyse the implications of the proposition of law involved, especially as that decision merely contains an assertion that the enhancement ought not to be allowed from any date previous to the date of the suit, where a prior decree for maintenance has been granted as between the parties.

It is well known that, at one stage, the entire question of a claim for arrears of maintenance was in doubt, as a legal claim, and the grant of this relief was held to be within the discretion of the Court. But it has since been settled law, by a series of decisions, which it is not necessary to set forth here, that even a demand and refusal need not precede the claim for arrears, and that mere non-payment of maintenance would *prima facie* constitute proof of wrongful withholding. In *Nagendramma* v. *Ramakottayya*[5], a Bench decision of this Court, to which one of us was a party, the case-law has been exhaustively reviewed, and the following observations are significant.

"The question of arrears is allied to that of quantum of maintenance and it falls within the range of the right to maintenance. It is a legal right not depending upon any demand and refusal for its enforcement, although a demand may show that the person demanding is in necessitous circumstances and is insisting upon her rights....But in Madras a long series of decisions have held that the right to arrears is an absolute right, defeasible only on proof of waiver, abandonment, estoppel or limitation ; in other words, that apart from these considerations, a Court has no discretion either to disallow arrears totally, or to cut down the period for which they are to be granted."

In this context, and before proceeding further with this line of reasoning, it may be desirable to state some undeniable facts. The plaintiff made the demand for maintenance at the enhanced rate through Exhibit A-47 dated 15th December, 1945, sent to both Sankaranarayana Ayyar and Srinivasa Ayyar by her Advocate. This was followed subsequently by another letter, dated 14th November, 1953 (Exhibit A-50), and it is admitted that the claim of the plaintiff was repudiated in 1945-1946 itself by reply notices Exhibits A-48 and A-49. The plaintiff states in her evidence:

"The brothers were saying that they will consult the other and pay me; so I kept quiet so long ....But they postponed. So I sent Exhibit A-52 (Copy)."

We are hence satisfied that the plaintiff did make a demand, that the demand was met by refusals, but that the plaintiff was reluctant to proceed to sue because the defendants representing these branches were promising to give her some relief,

1. (1868) 9 W.R. 152.
2. (1938) 2 M.L.J. 822 : I.L.R. (1939) Mad. 234.
3. I.L.R. (1941) Nag. 437.
4. A.I.R. 1948 Nag. 44.
5. (1958) 1 M.L.J. 25.

and that this state of negotiation and the reluctance of the plaintiff to proceed to the extreme of a suit, were responsible for the delay.

The question is whether, under the circumstances, enhanced maintenance could be granted from the date of demand and refusal, notwithstanding the fact that the previous decree was not sought to be varied by a suit at that stage. The right of the Court to grant enhanced maintenance, in view of changed circumstances, is an ample power which is not in dispute. It now finds statutory recogniton in the Hindu Adoptions and Maintenance Act (LXXVIII of 1956), in section 25, as follows :—

"The amount of maintenance, whether fixed by a decree of Court or by agreement, either before or after the commencement of the Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration ".

The very expression ' arrears of maintenance ' is not a happy or precise one ; if it implies that these are dues based upon some mere contract, which is invariable as between parties, and which further involves some positive agreement, demand or refusal, it is actually misleading, for this liability stems from the personal law governing the parties, and essentially is not a contractual obligation, though Courts have recognised the validity of contracts by which it may be affected.

It has to be noted that the early decision in *Sreeram Bhuttacharjee* v. *Puddomookhee Debia*[1], really related to the enhancement of maintenance fixed by a family arrangement, and it laid down the broad rule that mere cessation of payments is not a ground for enhancement. It was so understood by Wadsworth, J., in *Veerayya* v. *Chellamma*[2], and he was also referring to circumstances under which the payments under the old decrees had ceased. The Bench decision of the Nagpur High Court in *Trimbak* v. *Bhagu Bai*[3] did not deal with this issue, as we have earlier observed, but at page 449 there is a remark to the effect that the Courts should determine the right to the figure claimed which existed when the cause of action accrued. The dictum laid down at page 449 was that

"Unless a decree provides on the face of its machinery for its own alteration, variation can only be obtained by a separate suit properly framed for the purpose ".

This states the true position at law, if we may say so with respect and has to be followed. But it is not the point before us. *Savitribai* v. *Radhakisan*[4] was actually a case by the plaintiff for reduction of the amount fixed in a maintenance decree on the ground of altered circumstances, and the learned Judges observed—

"Therefore, down to the bringing of the suit for variation, the decree-holder has a right to the figure fixed in the decree. It follows that in such case there can be no retrospective variation either up or down. Whatever is decided in the subsequent suit, takes effect only from the date of that suit."

With great respect, we are unable to follow this decision, particularly as the reasoning upon which the proposition is based has not been made clear. It is undoubtedly true that the rate determined by the decree must prevail unless it is varied, but this does not necessarily imply that a Court has no power to vary that rate from a period anterior to the date of the suit brought for the variation. That would entirely depend upon the time from which the changed circumstances have prevailed, the reasonableness of the claim of the maintenance-holder to an enhanced allowance, the existence or absence of a specific demand and refusal, etc. It is one thing to state that the parties are governed by the rate until a variation is effected, and quite another to confine the power of Court to determine the period for which the right to enhanced maintenance should prevail. Actually, as Mr. K. Rajah Ayyar for the maintenance-holder pointed out, if this strict logic is to be adhered to, the Court should grant enhanced maintenance varying the rate of the previous decree only from the date of its own subsequent decree, and not from the date of suit. We think that the confusion arises from the fact that ' arrears of maintenance '

1. (1868) 9 W.R. 152.
2. (1938) 2 M.L.J. 822 : I.L.R. (1939) Mad. 234 at 241.
3. I.L.R. (1941) Nag. 437.
4. A.I.R. 1948 Nag. 44.

are frequently interpreted as akin to some kind of contractual obligation, so that the payment of maintenance at a particular rate is held to absolve the person liable to pay maintenance from payment of arrears determined upon some other rate, upon the argument that a superseding allowance should take effect only from the date of the second suit, where a previous maintenance decree had been in existence. The institution of such a second suit, or a delay in instituting it, may depend upon a variety of circumstances ; in a case like the present, for instance, it may be actually due to a demand met by a formal refusal, but really accompanied by some kind of subsequent negotiation, or a climate for settlement, where relief is promised. We do not think that the power of the Court to grant enhanced maintenance can be so circumscribed, or so rigidly affected. We hence hold that, appropriate to the facts of the present case, we would be amply justified in confirming the decree for arrears of maintenance from the date of demand 15th December, 1945 to 31st December, 1953, which is a reduced rate in comparison with the rate we are now decreeing in these appeals. We further direct that the charge given by the Lower Court be confirmed, upon the basis of the reliefs given in these appeals.

The appeal of the plaintiff is therefore allowed accordingly, and the appeal of the defendants and the memorandum of cross-objections are together dismissed with costs throughout (Advocate's fee one set). The contesting respondents should pay the Court-fee due to Government.

These appeals having been set down for being mentioned this day, the Court made the following Order :—

One set of costs which has been awarded will be in A.S. No. 492 of 1955 and the fee certificates will be permitted to be amended accordingly.

V.S. ——— *A.S.* No. 492 of 1955 *allowed.*
A.S. No. 462 of 1955 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

The Associated Cement Co., Ltd., Madukkarai Cement Works, Madukkarai .. *Petitioner**

v.

Labour Inspector (Central), Coimbatore and another .. *Respondents.*

Minimum Wagee Act (XI of 1948) *and Rules framed thereunder Rule* 23—*Scope of—If provides for payment of wages even for weekly holidays.*

Rule 23 of the Rules framed under the Minimum Wages Act only provides that unless the conditions laid down therein are satisfied, *viz.*, permission from Central Government being obtained and compensatory holiday being given, no worker in a scheduled employment should be required to work on the first day of the week, *viz.*, Sunday. The rule does not mean that an employer should pay wages even for the weekly holidays, generally Sundays on which the workers were not required or allowed to work.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in M.W.P. No. 26 of 1956 on the file of the Labour Court of Coimbatore (Authority under the Minimum Wages Act, 1948) and quash the Order, dated 20th December, 1957 and made therein.

M. K. Nambiyar and *K.P. Adiga*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondents.

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*W.P. No. 284 of 1958. 15th September, 1959.
(24th Bhadra 1881—Saka).

The Court made the following

ORDER.—This is a petition for the issue of a writ of *certiorari* to call for the records in Minimum Wages Petition No. 26 of 1956 on the file of the Labour Court at Coimbatore and quash an order passed by that Tribunal, dated 20th December, 1957.

The Associated Cement Co., Ltd., carrying on the business of manufacturing cement at Madukkarai is the petitioner. The proceedings out of which this petition arises originated in an application under section 20 (2) of the Act filed by the Labour Inspector of the Central Government at Coimbatore before the Labour Court—which is the authority constituted under section 20 (1) of the Minimum Wages Act, 1948—for a direction under sub-section (3) of section 20, on the allegation that the respondent there, the Associated Cement Co., Ltd., had paid less than the minimum rate of wages to certain of the company's employees.

The workmen to whom according to the Labour Inspector wages less than the minimum wages had been paid were those employed in lime stone quarries. The violation of the Minimum Wages Act and the Rules made thereunder was stated to consist in failure to pay wages for the weekly holidays for the period March, 1956 to June, 1956, to three employees whose names were set out in the annexure to the application. It was common ground that the application was filed as a test case, and that there were a very large number of other employees to whom also payments on the same basis had been made by the company.

There is no dispute that employment in stone-breaking or stone-crushing is an employment in a scheduled industry to which the Minimum Wages Act would apply. A Committee for the fixation of the minimum wages for stone-breaking and crushing operations had been set up by the Government of Madras on 26th September, 1950, under section 5 (*a*) of the Minimum Wages Act, and the Committee had, after an exhaustive enquiry fixed the minimum wages payable for workers in these industries. The basis upon which the Committee fixed this wage was to fix the minimum wage first for a month on the basis of the minimum requirements of the worker for a month of 30 days and to calculate the daily wage by dividing this sum by 26. It would thus be seen that the daily wage fixed had also taken into account payments for the weekly holiday to which the workmen were statutorily entitled. Subsequently, a second Committee was appointed, constituted by the same members as the first Committee to fix the rate of minimum wages for similar operations in mines, and the Committee submitted a report working out the minimum wage for workers in this industry on the same basis, that is, by taking the minimum monthly wage on the basis of 30 days in a month and dividing it by 26 so as to arrive at the daily minimum wage for the worker. The Government of Madras accepted the report of this Committee and passed a Government Order on 15th February, 1952, fixing the minimum rates for employment in stone-breaking carried on in mines. It is not necessary for the purpose of the points arising in this petition to go into the exact figures and hence I am not mentioning them. Subsequent thereto the Government of Madras promulgated on 24th June, 1953, rule 23 in conformity with this fixation of minimum wages. Rule 23, which was promulgated by the Madras Government was in the same terms as rule 23 of the Central Rules, 1950, on minimum wages promulgated by the Central Government on 14th October, 1950. Rule 23 ran :

"(1) Unless otherwise permitted by the Government no worker shall be required or allowed to work in a scheduled employment, on the first day of the week (hereinafter referred to as the 'said day') except where he has or will have a holiday for the whole day on one of the three days immediately before or after the said day. Every worker who shall be required or allowed to work in a scheduled employment on the said day shall be paid wages equal to his average daily wages during the week he has last worked.

Provided that the weekly holiday may be substituted by another day.

Provided further that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day.

(2) Where in accordance with the provisions of sub-rule (1) any worker works on the said day and has had a holiday on one of the five days immediately preceding it, the said day shall, for the purposes of calculating his weekly hours of work, be included in the preceding week.

Explanation : For the purpose of this rule 'Week' shall mean a period of seven days beginning at midnight on Saturday night '.

It is the proper construction of this rule that is in the main involved in this petition. Stated shortly the point arising is whether under this rule a payment had to be made for Sundays also which was allowed to the workmen as a weekly holiday. The complaint of the Labour Inspector proceeded on the basis that wages were due for the weekly holiday of Sunday also under the terms of rule 23 and the Labour Court, the authority under the Minimum Wages Act, has accepted this interpretation and had passed a direction under section 20 (3) of the Act requiring the Company to make payments on that basis. It is the correctness of this decision and the legality of this direction that is challenged in this writ petition.

Two points were urged by Mr. Nambiar, the learned counsel for the petitioner, in support of the petition. The first was that the period in regard to which there was a complaint of failure to pay wages covered March, 1956 to June, 1956 and that the authority constituted under section 20 of the Minimum Wages Act had, on the law as it stood on those dates, no jurisdiction to make a direction in regard to the wages for weekly holidays. Section 20, as it was originally enacted in 1948, vested " the authority " with jurisdiction to hear and decide matters arising out of the " payment of wages less than the minimum rates of wages to employees employed or paid in that area" (Section 20 (1)). This sub-section was amended by Central Act XXX of 1957, (which received the assent of the President on 17th September, 1957) by the introduction of the words

" or in respect of the payment of remuneration for days of rest or for work done on such days under clause (*b*) or clause (*c*) of sub-section (1) of section 13 or of wages at the overtime rate under section 14."

Even the petition filed by the Labour Inspector was before the date of this amendment. The question that was raised before the Tribunal was whether the Tribunal had any jurisdiction to entertain an application relating to a failure to make a payment in respect of remuneration for days of rest before the amendment came into force, and that since on the date covered by the complaint, as also the date when the petition was filed the amendment had not come into force, the Tribunal could only exercise the powers under the unamended section 20 (1) of the Minimum Wages Act. The Tribunal overruled this objection by stating that the amendment was declaratory and was, therefore, retrospective.

The learned counsel for the petitioner urged that this reasoning was unsound and that the Tribunal had assumed jurisdiction on an erroneous interpretation of the statute. The decision on this point would primarily depend upon the meaning of the expression ' rates of wages ' or rather the expression ' wages' occurring in sub-section (1) of section 20. It is common ground that the Tribunal had jurisdiction to entertain claims where payment was made at less than the " minimum wage ". If " wages " included the remuneration payable for days of rest, the jurisdiction of the authority under section 20 (1) would naturally extend to entertain a claim as regards that species of remuneration. " Wages " are defined in the Act by section 2 (*h*) to mean

"all remuneration capable of being expressed in terms of money which would if the terms of the contract of employment express or implied, were fulfilled, *be payable to a person employed in respect of his employment* or of work done in such employment." (Italics mine).

This is followed by certain items which are not to be treated as wages and the payment of remuneration in respect of days of rest is not of the items so excluded. Section 13 of the Act enables the appropriate Government to provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest ; as also to provide for payment for work for a day of rest at a rate not less than the overtime rate. The payment of remuneration for a day of rest would, therefore, be " wages payable to a person employed in respect of his employment " within the definition of section 2 (*h*). If such a payment constituted remuneration, and therefore, wages, it appears to me that even on section 20 (1) as it originally

stood a payment for a day of rest would fall within the scope of section 20 (1) of the Act. In this view the interpretation placed by the Tribunal on the purpose of the amendment effected to section 20 (1) by Central Act XXX of 1957 would appear to be well-founded.

The more substantial point, however, which Mr. Nambiar, the learned counsel for the petitioner, urged was in relation to the interpretation of rule 23 as promulgated by the Madras Government, which is in terms identical with rule 23 of the Central Rules. The construction of this rule came up for consideration before a Bench of the Bombay High Court in *The Trustees of the Port of Bombay* v. *The Authority under the Payment of Wages Act*[1] and the judgment of the Bench was delivered by Gajendragadkar, J., as he then was. It is sufficient to refer to the headnote of the report to understand the point decided. The headnote runs :

"Rule 23 of the Rules framed under the Minimum Wages Act (XI of 1948) provides that no worker shall be required or allowed to work in a scheduled employment on the first day of the week. In other words, the object of the rule is to allow the employment of a worker on a Sunday which is described as the first day of the week only if two conditions are satisfied: (1) the Central Government must permit such a course ; and (2) if a worker is asked to work on a Sunday then he must have a holiday for a whole day on one of the five days immediately before or after the said day, for which he shall receive payment equal to his average wages during the preceding week. Negativing the contention that if a workman is required to work on a Sunday he must receive payment as directed both for the Sunday on which he works and for the holiday, which he is entitled to receive, it must be held that the expression 'for which' in rule 23 refers to the holiday mentioned in the earlier part of the clause. The words 'for which' do not refer to the first day of the week but refers to the holiday in the preceding clause ".

This decision was cited to the Labour Court, but by a process of reasoning, which I am not able clearly to understand, it refused to follow this decision, and held that the interpretation which this Bench of the Bombay High Court placed upon this rule, was not correct. I feel unable to agree with this conclusion of the Tribunal. I will extract only a short passage from the judgment of Gajendragadkar, J., which expresses my own view of the matter :

" This rule provides that no worker shall be required or allowed to work in a schedule employment on the first day of the week. In other words, the object of the rule is to allow the employment of a worker on a Sunday, which is described as the first day of the week, only if two conditions are satisfied :

"(1) The Central Government must permit such a course; and (2) if a worker is asked to work on a Sunday then he must have a holiday for a whole day on one of the five days immediately before or after the said day, for which he shall receive payment equal to his average daily wages during the preceding week.

This second condition involves that, whenever a workman is required to work on a Sunday, within the specified period he must be granted a holiday and he must receive his wages as prescribed. The first proviso permits that the weekly holiday may be substituted by another day ; and the second proviso provides a valuable safeguard to the worker by directing that no substitution shall be made which would lead to the result that the worker would work more than ten days consecutively without a holiday. The usual rule appears to be that every Sunday should be a day of weekly rest. Rule 23 provides for an exception; it allows the employer to require or permit his workman to work on a Sunday, but since this course amounts to depriving workman of his legitimate and usual day of weekly rest, the employer is required to obtain the consent of the Central Government requiring the workman to work on a Sunday and he is also required to give the workman a holiday within the period mentioned and pay wages to him. This rule can be pressed into service by the employees in the present cases when it is common ground that they were neither required nor allowed to work on any of the Sundays in question."

The construction which the Tribunal adopted on the terms of rule 23 was clearly erroneous, and this order under section 20 (3) based on such interpretation is, therefore, vitiated by apparent error and has therefore to be set aside. It is not disputed that if rule 23 is interpreted as in the judgment of the Bombay High Court, there has been no violation of the Minimum Wages Act committed by the petitioner-company.

The writ petition succeeds and the rule *nisi* is made absolute. I have only to add that the Labour Inspector has not contested this petition. There will be no order as to costs.

R.M. — *Petition allowed.*

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1. (1957) 1 Lab.L.J. 626.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Somasundarathu Odayar .. *Appellant**

v.

Kalyanasundarathu Odayar (died) and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), *section* 8, Explanation III—*Scope and applicability —Renewal and identity of the debt—Settlement of accounts—Debt if can be traced back.*

The effect of *Explanation* III to section 8 of the Madras Agriculturists Relief Act is to emphasise the identity of the debt. So long as that identity can be traced any changes or alterations in the debtor or creditor would not take away the case from the ambit of the *Explanation.*

The debtor is always entitled to the advantages of section 8 so long as the identity of the debt remains intact. He cannot be denied those advantages even if certain intercurrent transactions have entered into the stream of transactions. The fact that the renewal does not take account of the statutory reduction of liability would be immaterial. It is always open to the debtor to subsequently plead failure of consideration to this extent.

A transaction which may be termed as a settlement of accounts cannot *ipso facto* have the effect of preventing the debtor from tracing back the debt in order to obtain relief under the Act. That would depend entirely upon the identity of the debt being traceable through a series of transactions.

Singanarayana v. *Venkataramana Rao,* (1953) 1 M.L.J. 267 : I.L.R. (1953) Mad. 295 (F.B.), distinguished.

Appeal against the Order of the Court of the Subordinate Judge of Kumbakonam, dated 21st February, 1956 and made in O.P. No. 11 of 1955.

R. Gopalaswami Ayyangar, for Appellant.

G. R. Jagadisan, T. S. Kuppuswami Ayyar, K. Raman and *T. R. Venkataraman,* for Respondents.

The Court delivered the following

JUDGMENT:—This Civil Miscellaneous Appeal is preferred by the first respondent in the Court below in a petition for scaling down a debt under section 19-A of Madras Act IV of 1938. The petitioner in the lower Court has filed a memorandum of cross-objections, which has also to be dealt with.

The facts are these. The petitioner in the lower Court and the sons of his brother, Sivasankara, Vayyapuri and Sivagnana constituted a Hindu joint family. On behalf of this family, and during the course of his management, Sivasankara borrowed Rs. 10,000 in March, 1928, executing a promissory note therefor. Several payments were made towards this note, and, for the balance due under it and comprising a fresh loan of Rs. 800 or so taken, Sivasankara executed another note in February, 1931, for Rs. 4,800 and odd. In June, 1933, this was renewed by a promissory note for Rs. 10,000 and odd executed by Sivasankara and the petitioner in the lower Court. This not merely included the principal and interest under the promissory note of 1931, but also fresh loans taken prior to October, 1932. Sometime thereafter Rs. 3,000 was borrowed, and certain payments were made towards that debt. For the balance due on those dealings, and the promissory note of 1933 earlier referred to, a fresh promissory note for Rs. 16,092-2-0 was executed by Sivasankara and the petitioner in the lower Court on 7th May, 1936. It is alleged that Rs. 5,000 had been paid under this document.

In December, 1949, there was a partition arrangement in the family of the petitioner in the Court below, and the debt was allotted to his share. It appears later that Vayyapuri, among the members of this joint family, and the son and widow of Sivasankara also undertook to pay some amounts, and did do so. The petition

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*A.A.O. N. 282 of 1956, 24th October, 1959. (2nd Kartika, 1881—Saka.)

in the Court below was instituted upon the basis that the entire group of dealings related to the joint family, the debt being traceable through a series of renewals without loss of its identity at any stage. It was under these circumstances that the petitioner in the Court below sought relief under the provisions of Madras Act IV of 1938.

It is important to note the grounds upon which the first respondent below (appellant here) has filed his appeal. The main point taken is that Exhibit B-8 dated 7th May, 1936 (for Rs. 16,092-2-0 already referred to) is a result of a mutual settlement of accounts between the parties, so that it is not open to the Court to proceed into the prior transactions. There could be no question of any outstanding interest to be wiped off, nor of any open payment available for appropriation by the Court. Under those circumstances, the learned Subordinate Judge erred in holding (paragraphs 16 of his judgment) that " the debt will have to be scaled down under sections 8 and 9 of the Act." The same argument is sought to be reinforced upon other grounds. Not merely the amounts shown in the various promissory notes, but dealings in money (hand-loans) between the parties have entered into the history of the transactions, and have been taken into account in the settlement. Consequently, the petitioner below was not entitled to go behind Exhibit B-8. Further, the identity of the debt has not been maintained, and the provisions as to renewal laid down in sections 8 and 9 are inapplicable. Again, the accounts show that, from time to time, credits and debits have been balanced, and exhibited as cancelling each other (Tamil entry ; *Kanchu, Ner*). Hence, nothing was left outstanding for appropriation. In any event, the accounts filed were maintained by an interested party now colluding with the petitioner in the Court below, and ought not to have been relied on.. The joint family did not figure as an entity in these transactions, and the debt was not a family debt at all. On the contrary Sivasankara and the other members separately conducted individual transactions, till the promissory notes of 1933 and 1936, and even at that stage, those transactions merely became clubbed into the transactions of two members of the family.

We shall later proceed into the grounds appearing in the memorandum of cross-objections filed by the petitioner in the lower Court (1st respondent here). For the moment, it is sufficient to note that the crux of the memorandum is that the calculation adopted by the lower Court is incorrect. The entries clearly show that the payments were appropriated by the creditor towards principal at every relevant stage. The balance due is shown as principal, and outstanding interest, separately. Hence, the outstanding interest, remaining unappropriated, will stand wiped out on 1st October, 1937, by virtue of the provisions of the Act. In other words, the objection is entirely to the method of calculation.

We shall now deal with the arguments advanced by the learned counsel for the appellant (first respondent below), who has addressed arguments at length upon the facts, and also upon several decisions bearing on the legal implications, with specific reference to Madras Act IV of 1938.

The arguments concerning the identity of debtor and creditor and the reliability of the accounts filed in suit, may be immediately disposed of. In paragraphs 11 and 12 of his judgment, the learned Judge has discussed this matter at length. He relies upon the testimony of the Karnam (P.W. 1), who had special acquaintance with the family, and comes to the conclusion that, throughout, all the dealings, whether they were promissory notes, or money borrowed upon hand-loans, were by and on behalf of this joint family. The learned Judge held that both the petitioner in the Court below, and Sivasankara were managing members of this joint family, at different stages. The point is really of very little significance, in view of the present form of *Explanation III* to section 8 of Madras Act IV of 1938, after the further amendments which have been enacted. Admittedly, as the definition stands, the term 'debtor' includes " heirs, legal representatives, or assigns or any other person acting on his behalf or in his interest". The matter

has been considered in *Srinivasa Pillai and others* v. *Muthayya Pillai and another*[1], by the learned Chief Justice and Panchapakesa Ayyar, J. The decision has laid down that the effect of the present form of the *Explanation* is to emphasise the identity of the debt. So long as that dentity can be traced, any changes or alterations in the debtor or creditor would not take away the case from the ambit of the *Explanation.* The renewed document may be by a person other than the original debtor, and in favour of a person other than the original creditor.

The finding of the lower Court upon this point is hence correct.

The more difficult question is whether the identity of the debt has also been established, in these series of transactions. What is urged by learned counsel for the appellant is that hand-loans, individual promissory notes and part payments towards the debts figure in a confusing manner, which renders it extremely difficult to apply the provisions of sections 8 and 9 of Madras Act IV of 1938 to this group of transactions. But, as we find from the accounts, it is clear that throughout, there is the connecting strand or thread which enables us to trace back the debts from the promissory note of 1936 (Exhibit B-8) to the original transactions of 1931 and 1928. So long as this trace or connecting thread runs through the transactions, we are unable to see how it could be maintained that the identity of the debt has disappeared. The facts that there have been interim transactions, whether of promissory notes or hand-loans, merging in the renewals at different stages, or that one or other member has acted on behalf of the joint family, cannot make any difference. We hold that since the strand or continuity is unimpaired, the identity of the debt remains, enabling the debtor to obtain relief. We also hold that since the accounts are clearly genuine and contemporaneously maintained, they must be accepted as the basis for relief in this case. It is not as if the appellant has produced any other set of accounts, which could form the alternative for scaling down operations.

The far more important argument is that the promissory note of 1936 (Exhibit B-8) is the result of a mutual settlement of accounts between the parties, and that, as such, there could be no question of any outstanding interest to be wiped off, or any open payments to be appropriated. In this view, the document of 1936 (Exhibit B-8) becomes the starting point for the application of the provisions of the Act, particularly as other dealings were also taken into account in the settlement. It is strenuously contended that the Full Bench decision of this Court in *Suryanarayana* v. *Venkataramana Rao*[2], is an authority for this view.

We think that this is to misconceive altogether the true scope and applicability of the Full Bench decision in *Suryanarayana* v. *Venkataramana Rao*[2]. Before proceeding to that decision, we desire to refer to one or two other cases of this Court, which do illustrate the type of circumstances under which the Courts have found it impossible to proceed behind the face or form of a particular debt, when attempting to apply the provisions of Madras Act IV of 1938. A good illustration of this is to be found in *Subbarayudu* v. *Sriramalu*[3]. The learned Judges Wadsworth and Patanjali Sastri, JJ., held that where a compromise decree was demonstrably a renewal of an anterior debt, the Court could scale down that decree, and give relief under Madras Act IV of 1938. But where the compromise was a result of mutual concessions and advantages which made up the agreement, and where in consequence it was extremely difficult to disentangle that part which was a renewal of the original debt, it became impossible to treat the transaction as a renewal. The compromise decree had to be then considered as the starting point, and the provisions applied. Another interesting case is *Grandhi Hanumantha Rao* v. *Chinnarama Naidu and others*[4]. The same learned Judges (Wadsworth and Patanjali Sastri, JJ.) were applying the provisions of the Act to a particular promissory note debt, which was discharged by the execution of two further documents. The circumstances were such that it was impossible to determine how much principal and how much interest traced from

1. (1956) 1 M.L.J. 319.
2. (1953) 1 M.L.J. 267 : I.L.R. (1953) Mad. 295 (F.B.).
3. (1943) 2 M.L.J. 367.
4. (1943) 1 M.L.J. 190.

the original transaction, was included in each of the two subsequent documents. Those documents carried different rates of interest, and the two contracts also differed in their terms. In such a context, it was neither practicable nor desirable to treat the two separate contracts, as if they formed together a single debt renewing the prior liability. In *Kodali Venkayamma* v. *M. Ramakotayya*[1], the same learned Judges have pointed out that the mere awarding of counter interest does not imply that the payment does not remain open. The appropriation could only be deemed to have been made when the fresh document was executed, after deducting payments with counter interest. In *Valliammal* v. *Ramaswami Goundar and others*[2], the same learned Judges held that the mere fact that the later mortgage bound property not covered by the earlier mortgage, could not affect the question whether the later mortgage was a renewal of the earlier mortgage. Nor will the answer be affected by the fact that the later mortgage comprises an additional consideration, besides the discharge of the earlier mortgage. Again, where a renewal does not take into account the statutory reduction of liability under the prior debt, it is open to the debtor to take the plea that the subsequent note was not supported by consideration to the extent which is in excess of what was due under Act IV of 1938. Reference might be made to *G. Mullikarjuna Rao* v. *M. Tirupurasundari*[3], and *G. Suryanarayana* v. *T. Alavandara Rao*[4], and also to the Full Bench decision in *V. S. T. Sheik Mansoor Tharaganar and another* v. *S. V. S. Sankarapandia Mudaliar*[5].

What is the result of the decisions that we have examined with reference to the principles applicable to a matter of this kind? So long as identity of the debt remains intact, the debtor is always entitled to the advantages of a beneficent legislation like Madras Act IV of 1938. He cannot be denied those advantages, even if certain intercurrent transactions have entered into the stream of transactions. It would not matter that additional consideration from other incidental dealings has entered into certain renewals, that further properties have entered into a hypothecation, and so on. The fact that the renewal does not take account of the statutory reduction of liability, would again be immaterial. It is always open to the debtor to subsequently plead failure of consideration to this extent. The test is not whether there has been only one linked series of transactions, or whether other transactions have merged in the renewals. So long as the broad identity of the parties remains, within the meaning of *Explanation III* to section 8, it would not matter which particular member of the family dealt with the creditor. Again, so long as the debt is traceable through the series, and the identity of the debt remains, the complexity of the circumstances will be no ground for denying relief. It is only where the identity of the debt is itself destroyed, because the renewal is in such form that the constituent elements thereof in regard to the prior debt cannot be traced, that the renewal debt becomes the starting point. The two most important cases upon that aspect are *Grandhi Hanumantha Rao* v. *Y. Chinnarama Naidu and others*[6] and *Subbarayudu* v. *Sriramulu*[7]. In both those cases the identity of the debt was destroyed, and tracing back became impossible, and the learned Judges hence held that the renewals were the starting points for the application of the Act.

That is not at all the case here, and the accounts and the documents themselves clearly show the identity of the debt running through the entire series of transactions. We have now to see how far the Full Bench decision in *Suryanarayana* v. *Venkataramana Rao*[8], helps the contention of the appellant that we ought not to go behind the document Exhibit B-8, because it is the result of a settlement between the parties, even if tracing back is perfectly feasible.

This matter can be quite simply dealt with. A careful examination of the decision shows that the point which arose for determination was the consequence of the enactment of *Explanation I* to section 8 by amending Act XXIII of 1948,

1. (1941) 1 M.L.J. 316.
2. (1942) 2 M.L.J. 720.
3. (1953) 2 M.L.J. 313.
4. (1945) 2 M.L.J. 565.
5. (1958) 2 M.L.J. 568.
6. (1943) 1 M.L.J. 190.
7. (1943) 2 M.L.J. 367.
8. (1953) 1 M.L.J. 267 : I.L.R. (1953) Mad. 295 (F.B.).

which itself was necessitated by the decision in *Doraisami Mudaliar* v. *Md. Amiruddin*[1], where Gentle, C.J., and Bell, J. held that a particular payment was liable to be appropriated first towards interest due under the decree and then only towards principal, reversing the trend of earlier cases of this Court. The Full Bench decision in *Suryanarayana* v. *Venkataramana Rao*[2] examines the scheme of section 8, with specific reference to the *Explanation*, upon the vital aspect of the unilateral right of the creditor to appropriate payments towards interest, under section 60 of the Contract Act. The relevent passage may be set forth *in extenso* as follows :

"The point for decision is whether by the *Explanation* the Legislature intended to alter the law as laid down in the decisions. An examination of the scheme of section 8 does not support the contention that such alteration was intended. Section 8 (1) enacts that "all interest outstanding" on 1st October, 1937, shall be deemed to be discharged. These words presuppose that interest as such remains outstanding and payable on that date and it is that outstanding interest that is discharged by the operation of the statute. If in fact there was no interest payable on that date section 8 (1) would have no application. Likewise, when the *Explanation* provides that the payments shall be credited towards principal, it presupposes that those payments are still open and unappropriated. In other words, for the *Explanation* to apply there must be on the one hand arrears of interest outstanding and payable and on the other, payments open and unappropriated and the *Explanation* provides how in that contingency the payments are to be appropriated. Where there has been in fact a settlement of accounts and a fresh document executed by the debtor, that must necessarily have the effect of discharging the interest on the one hand and of appropriating the payment on the other. Such a transaction would therefore seem to be outside the *Explanation*."

We have extracted this passage, in order to show the context of the Full Bench decision, and also its true applicability and scope. The decision is concerned with the effect of a fresh document, upon outstanding interest, or as an appropriation of the payment. It is not authority for the view that where there is a transaction which may be called a 'settlement of accounts', this has *ipso facto* the effect of inhibiting the debtor from proceeding into prior transactions, in order to obtain reliefs under Madras Act IV of 1938. That would depend entirely upon the identity of the debt being traceable through the series of transactions, and the tests that we have earlier referred to. In brief, the Full Bench decision really refers to the character of an appropriation, and, how a renewal may evidence appropriation, and does not lay down any wide proposition that a transaction which is termed as a 'settlement' will have the effect of preventing a debtor from claiming benefits under section 8 or section 9 by tracing the debt back.

Under those circumstances, the grounds urged in the appeal itself seem to be lacking in substance, and must be rejected.

We now come to the memorandum of cross-objections. Here, it has to be stated that the lower Court has not given effect to the state of affairs really evidenced by the accounts and the documents. What we find in the present case is that a series of payments were specifically appropriated towards the principal, *ex facie* and as declared by the particulars of the accounts. The nature of an appropriation was dealt with by King, J., in *Raghava Reddiar* v. *O. Devarajulu Reddiar*[3]. The learned Judge defined appropriation as "the indication of an intention that money would be applied in a particular way", and pointed out that proof of it could be by a statement oral or written, or by circumstantial evidence. It is urged against the cross-objector that interest has been calculated upon the entire debt, notwithstanding these specific appropriations towards the principal. It appears very much as if the appropriation towards principal were made for some ancillary purpose, such as reduction of the amounts liable to be assessed for income-tax, and so on. But, for whatever purposes these appropriations were made, they are exhibited in the accounts, and the force of such express appropriation cannot be denied. The result certainly is that interest alone is left outstanding, and that the provisions of Madras Act IV of 1938 (sections 8 and 9) thus do become applicable. Further, we are clear that the periodical balance of credit and debit entries to show a *nil* balance was a particular method of maintaining the accounts, and no evidence of a fresh settlement at each stage. Since the appropriations towards principal have to be given

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1. (1948) 1 M.L.J. 441.
2. (1953) 1 M.L.J. 267: I.L.R. (1953) Mad. 295 (F.B.).
3. (1942) 2 M.L.J. 724.

effect to, the calculation pressed for by learned counsel for the cross-objector (respondent) is accepted by us, and we accordingly declare the liability to be Rs. 1,537-1-1. This will carry interest at 5½ per cent. under the Act, till date of realisation. The memorandum of cross-objections is thus allowed in part, and the Civil Miscellaneous Appeal dismissed with costs to the respondent in the appeal.

V. S. *Appeal dismissed and Cross-Objections allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE RAMASWAMI.

Southern Automotive Corporation (Private) Limited .. *Petitioner* (Applicants).*

Companies Act (I of 1956), sections 391 and 394—Scope—Duties of Court—Amalgamation scheme—Application for sanction—Prayer for dispensing with calling of extraordinary general meeting on ground of previous approval of scheme by general meeting—If can be allowed—Factors to be considered.

The duties of the Court under section 394, Companies Act, are onerous and have to be carefully exercised, and the Court can come to a decision required of it under section 394, only if it is satisfied that the matter has been considered at an extraordinary general meeting of the members specially called under section 391 of the Act.

Where a company seeks the sanction of the Court for amalgamation with another company and applies for an order dispensing with the calling of an Extraordinary General Meeting as required by the Act, on the ground that there was a prior General Meeting of the members at which the arrangement for amalgamation was unanimously approved, the Court will refuse to accede to the request for dispensing with the holding of an Extraordinary General Meeting, when it is not shown that any hardship or unnecessary or undue delay will be caused by compliance with the provisions of section 391.

Section 394 requires the convening of an Extraordinary General Meeting of the members under the directions of the Court under section 391 and the importance of that meeting cannot be easily overlooked and the procedure cannot be short-circuited. The shareholders have a fiduciary responsibility to act not only in the interests of the majority but in the interests of the shareholders as a whole, and the shareholders can ordinarily function only at the General Meeting and at such other Extraordinary General Meetings as may be convened under the Act.

In the matter of the Companies Act I of 1956 and in the matter of Southern Automotive Corporation, (Private) Limited.

R. Rajagopala Iyer for *Messrs. John and Row,* for Applicants.

The Court delivered the following

JUDGMENT.—This is an application for dispensing with the calling of an Extraordinary General Meeting of the Southern Automotive Corporation (Private) Limited, Madras.

The Southern Automotive Corporation (Private) Limited, has filed a petition for obtaining the sanction of this Court for amalgamation with another company, *viz.*, the South India Automotive Corporation, (Private), Limited, which is carrying on similar business in the city of Madras. Section 394 of the Indian Companies Act, 1956, requires the convening of an Extraordinary General Meeting of the members under the directions of this Court under section 391 of the said Act for the purpose of considering and passing the proposed arrangement for amalgamation. The applicant wants this procedure to be short-circuited on the ground that there was a General Meeting of the Members on 15th June, 1959 and that they have approved unanimously this arrangement for amalgamation, and that therefore the holding of an Extraordinary General Meeting of the company as required by section 391 to consider and approve the amalgamation would be superfluous and would cause hardship, unnecessary expense and undue delay.

I am unable to accede to this request for these reasons. First of all, the learned advocate for the applicant was not able to point out any hardship or unnecessary or undue delay which would be caused by compliance with the provisions of section

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*Company Application No. 29 of 1959. 11th November, 1959. (20th Kartika, 1881—Saka)

391. Secondly, the duties of this Court under section 394 are onerous and have to be carefully exercised and therefore this Court can come to the decision required of it under section 394 of the Act only if it is satisfied that the matter has been considered at an Extraordinary General Meeting of the members specially called for under the directions of the Court under section 391 of the Act.

The importance of the convening of the Extraordinary General Meeting cannot be easily overlooked. The primary organisation through which the company functions is the meeting of the shareholders. It is by using their power at meetings that shareholders exercise control over directors. The resolution of the majority, voting at the general meeting, binds the company and its members. The shareholders have to act in accordance with the provisions of the Companies Act as also the Memorandum and Articles of the company, in so far as the provisions therein are not inconsistent with the Act. It must be remembered that a shareholder is not a creditor of the company nor a debenture-holder thereof. His rights can only be exercised in accordance with the Act. There may be occasions where the majority acts in a manner oppressive to the rights of the minority shareholders or of any particular shareholder. In such cases the Act had made provision for protecting the rights of the minority or the individual shareholder. The principle upon which this is done is that the shareholders have a fiduciary responsibility to act not in the interests of a majority only but in the interests of the shareholders as a whole. Where this position is abused there is a fraud on the minority, as the term is understood in law, and there need not be necessarily fraud or deceit in the ordinary sense.

The shareholders forming the company can ordinarily function only at the General Meeting and at such other Extraordinary General Meetings as may be convened under the Act. They do so as already stated, subject to such rights and obligations as attach to their shares and subject to the provisions in the Act and the Memorandum and Articles of Association of the company. These can happen only once in a way and all that the shareholders can do is to decide on such matters as the Act provides and discharge major functions such as the appointment of directors and auditors and the passing of the balance-sheet and profit and loss account, and they have inherent power to take all steps to ensure its proper working and this includes the power to appoint directors as provided by the Act. The present Act confers on them considerably larger rights than before. Except such powers as are reserved to the shareholders to be exercised at their meeting all the powers exercisable by the company are vested under the Act in the Board of Directors. Besides the Board of Directors, the Act provides for various forms of executive machinery.

The Company Law Committee had the following observations to make :

"The nature of a shareholder's control over the affairs of a company has been the subject of such comment in recent discussions on the subject of company law reform both in this country and elsewhere. As the Cohen Committee observed :

'The illusory nature of the control theoretically exercised by shareholders over directors has been accentuated by the dispersion of capital among an increasing number of small shareholders who pay little attention to their investments so long as satisfactory dividends are forthcoming, with lack of sufficient time, money and experience to make full use of their rights as occasion arises and who are, in many cases, too numerous and too widely dispersed to be able to organise themselves'.

The Millin Commission in South Africa expressed itself in almost similar terms when it stated :

'The assumption underlying existing legislation is that shareholders are able to take an active interest in the Company's affairs and will always be able to use their voting power to the company's advantage. The assumption may have been justified in earlier days when the capital of the companies was largely in the hands of persons who knew enough about the business of the company to maintain an effective check on the activities of the directors they elected and were able to attend meetings to enforce their views. It is certainly not justified today when the shareholders in public companies are distributed over wide areas, and it is impossible that they can ever be gathered together in one place for attendance at Company meetings . . . . . .'"

In addition to the facts mentioned above some recent developments in corporate finance, *e.g.*, the growth of investment trust companies have further tended to widen the gap between the ultimate investor and those in charge of the management of

his investments, while circumstances in this country have imposed a special handicap on them. The comparatively low standard of business knowledge and experience of the average investor, the absence of any well informed and reliable financial press, and long distances which make it difficult for investors to combine for the exercise of their rights, have rendered them particularly ineffective.

"There are only two ways in which the Company law can partially redress the balance in favour of shareholders—first by the fullest possible disclosure of the facts relating to the promotion, formation and working of joint stock companies ; and secondly, by enactment of such suitable provisions for the holding and conduct of company meetings as will enable active and competent shareholders to take an effective part in the business transacted in them . . . ."

(*See* T. R. Srinivasa Iyengar's Companies Meetings, Accounts Audit and Investigations (1957) Law Book Co., Allahabad) page 14 and following; T.R. Srinivasa Iyengar, Companies Administration (1958) (Law Book Co.) page 1 ; Gore-Browne, Handbook of Joint Stock Companies, Fortyfirst edition, page 410 and following; Buckley on the Companies Act, Thirteenth edition, page 319 and following ; Ghose, The Indian Company Law, Tenth Edition, Part II, section 709 and following).

Therefore, the applicant is directed to hold an Extraordinary General Meeting of the shareholders as contemplated by section 391 of the Companies Act and as per Rules, and then move this Court under section 394 of the Act which will be considered then on merits.

P.R.N. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE BALAKRISHNA AYYAR.

B. Hariharamuthu Pillai .. *Petitioner**
(*Petitioner—Defendant*).

v.

Rani Subbulakshmi Nachiar, Hereditary Trustee of Kattalais of Sri Thirukoshtiappar, etc., Temples and others .. *Respondents.*

Madras Estates Supplementary Act (XXX of 1956), section 11—Transfer of suits and proceedings from Civil Court to the Special Tribunal—Scope of—Composite suits—Procedure.

Having regard to the general scheme of the Madras Estates Supplementary Act, 1956, and reading it as a whole it would appear that the question whether a particular area formed part of an estate or whether they are minor inam lands would have to be decided by the tribunal set up under section 5 of the Act. The wording of section 11 of the Act is so comprehensive that all proceedings in which such questions arise for determination shall be transferred to the appropriate tribunal for the determination of such question. The jurisdiction of the tribunal is not restricted only to cases involving implementation of the Madras Estates Land (Reduction of Rent) Act, 1947, or the Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948.

It is no doubt true that the tribunal constituted under the Act is not competent to decide civil suits in which such questions are involved. But section 11 of the Act makes it clear that the transfer of such suits to the tribunal is only for the limited purpose of determining the question whether any particular area is or was an estate or inam estate. It cannot decide any other issue raised in the suit. In such cases, after determination of such issues by the tribunal the suit will have to be re-transferred to the Civil Court.

Bhaskaran v. *Chellappa Goundan*, (1960) 1 M.L.J. 183 : I.L.R. (1959) Mad. 452 and *Muthiah* v. *State of Madras*, (1959) 72 L.W. 249.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the District Munsiff of Ambasamudram, dated 27th November, 1957 and made in I.A. Nos. 986, 992, 997, 1002, 989, 990, 991, 980, 1003, 1005, 981, 994, 975 of 1957 in O.S. Nos. 122 of 1954, 222 of 1957, 125 of 1954, 154 of 1955 241 of 1956, 243 of 1956, 248 of 1956, 151 of 1955, 155 of 1955, 238 of 1956, 221 of 1957, 227 of 1957 and O.S. No. 120 of 1954 respectively.

D. Ramaswamy Iyengar, for Petitioner.

T. R. Ramachandran, for first Respondent.

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*C.R.P. Nos. 1798, 1947, 1948 of 1957, 4 to 10 and 94 to 96 of 1958. 1st October, 1959.
(9th day of Asvina, 1881—Saka.).

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*K. Veeraswami*) on behalf the second Respondent.

The Order of the Court was made by

Balakrishna Ayyar, J.—Rani Subbalakshmi Nachiar, claiming to be the hereditary trustee of certain kattalais attached to some temples in what was formerly the Zamindari of Urkad, filed several suits in the Court of the District Munsiff of Ambasamudram, to recover what she claimed were arrears of rent from the defendants. According to her, the kattalais which she represented are entitled to full rights in the suit lands, that is to say, both to the *melvaram* and to the *kudivaram*. The defendants, in their turn, pleaded that they are entitled to permanent rights of occupancy in the lands. The following questions, therefore, arose for the determination.

(1) Whehther the plaint schedule lands and other lands form a part of the estate of the Zamindari of Urkad which has been notified and taken over by Government under the Abolition Act?

(2) Whether they are not minor inam lands?

(3) Whether the defendants had acquired permanent occupancy rights in the suit lands?

(4) Whether the lands have all along been treated as ryoti lands?

Issues raising these points were framed in the suits. The defendants filed Interlocutory Applications in the Court of the District Munsif of Ambasamudram praying that since these questions had been raised the suits should be transferred to the Estates Abolition Tribunal, Madurai, under section 11 (1) of Madras Act XXX of 1956. The District Munsiff dismissed the petitions. The petitioners thereupon came to this Court in revision.

The learned Chief Justice, who heard the revision petitions, was inclined to allow them. But then, after he had dictated the order he proposed to make it was brought to his notice that a different view of the matter had been taken by Ramachandra Iyer, J., in C.R.P. No. 168 of 1958 and by Basheer Ahmed Sayeed, J., in C.R.P. No. 1657 of 1957. Having regard to this difference of opinion, and, in view of the importance of the question raised, the matter has been posted before a Division Bench.

It is necessary to add that the State of Madras filed a petition to be brought on record, in view of the fact that the question raised is one of considerable importance and likely to affect a number of other cases. That petition was allowed and we have had the benefit of the arguments of the learned Advocate-General on behalf of the Government.

The contentions raised before us call for an analysis of the general scheme and scope of Madras Act XXX of 1956. That Act was intended to make special provision for the determination of two questions.

(1) Whether an area is or is not an estate or part of an estate as defined in section 3 (2) of the Estates Land Act.

(2) Whether an area is or is not an inam estate as defined in section 2 (7) of the Abolition Act. Section 3 (1) confers a right on any persons interested in the matter to make an application for the determination of either of these questions. The application has to be made to the Tribunal constituted under the Act. Under sub-section (2) of section 3 the application has to be filed within three months of the occurrence of one of the following events:—

(1) the date on which Act XXX of 1956 came into force;

(2) the date of the publication of an order under section 3, sub-section (2) of the Rent Reduction Act; or

(3) the date of the notification under section 1, sub-section (4) of the Abolition Act. Section 4 gives the State Government one year's time to appeal from a

decision that may have been given by any Court or Tribunal or a Settlement Officer. If the decision has been given by the Settlement Officer, the appeal would lie to the Tribunal. If the decision has been given by a Court or Tribunal constituted under the Abolition Act then the appeal would lie to the Special Appellate Tribunal, which would be a Bench of this Court constituted under section 7 of the Act. Section 6 prescribes the procedure to be followed by the Tribunal. Section 7 provides for appeals to the Special Appellate Tribunal. Section 8 raises a presumption on the question, whether any inam village or a separated part of an inam village was or was not an estate within the meaning of the Estates Land Act before it was amended in 1936. Section 10 specifically enacts that except as otheweise expressly provided for in the Act, no civil or revenue Court and no Tribunal constituted under any other law, shall have jurisdiction to decide whether any non-ryotwari area is or is not an estate or part of an estate or is or is not an inam estate. Section 11 provides that all suits, appeals or other proceedings except those pending in the High Court at the commencement of the Act in which any question in issue is whether a particular area is or was an estate, or whether any particular area is or was an inam estate,

> "shall stand transferred to the appropriate Tribunal constituted under this Act for the determination of that question."

Section 12 contains certain ancillary provisions to deal with matters arising when the High Court remands a suit or proceeding. The other provisions of the Act are not material here.

It will be noticed that the scheme of the Act is to vest in the Tribunal constituted under section 5, subject to an appeal to the Special Appellate Tribunal constituted under section 7, exclusive jurisdiction to decide the two questions set out before, *viz.*, whether any non-ryotwari area is or was an estate or not or whether any area is or was an inam estate or not. It will be noticed that section 4 gives the Government a right of appeal within one year from the date on which Act XXX of 1956 came into force, however long before that Act, the orders in question may have been passed. In the case of private individuals the period of limitation is shorter. As the Act stands appeals from questions which have been decided, questions which are pending and questions which may arise in future have all to go to the Tribunal. Reading the Act as a whole it would therefore appear that the questions whether the suit properties formed part of the zamindari of Urkad, or whether they are not minor inam lands, would have to be decided by the Tribunal set up under section 5 and by that Tribunal alone.

In *Bhaskaran* v. *Sellappa Goundan*[1], Ramachandra Iyer, J., took a different view. That was a case in which the District Munsif of Sankari, on an application made in that behalf, transferred the records in O.S. No. 67 of 1955 on his file to that of the Tribunal, Vellore, under section 11 of Madras Act XXX of 1956. The plaintiffs objected to the transfer and came to this Court in revision. Ramachandra Iyer, J., set aside the order of the lower Court and directed it to restore the suit to its file and dispose of it according to law. One reason which the learned Judge gave for taking the view he did was this:

> "There is no provision either in Act XXX of 1956 or in the Abolition or Rent Reduction Acts, for deciding suits by the Tribunals appointed under the Act. Nor is there any provision for re-transfer of the suits by the Tribunal to the Civil Court after the determination of the issue to enable the Civil Court to decide the rest of the suit."

The learned Judge was undoubtedly right, when he said that there is no provision in any of the three Acts he mentioned that would enable the Tribunal to *dispose* of the suit. It may also be correct to say that there is no express provision in section 11 for enabling suits to be re-transferred to the file of the Civil Courts from that of the Tribunals. But, from that the conclusion reached by the learned Judge does not, it seems to us, necessarily follow. Sub-section (1) of section 11 provides that all suits or proceedings in which the two questions which we have mentioned are raised

> "shall stand transferred to the appropriate Tribunal constituted under this Act *for the determination of that question*."

1. (1960) 1 M.L.J. 183 : I.L.R. (1959) Mad. 452.

The words italicised would make it plain that the transfer of the suits to the Tribunal is only for a very limited purpose, *viz.*, the determination of the question whether any particular area is or was an estate, or whether it is or was an inam estate. The jurisdiction of the Tribunal is confined to the determination of these questions alone. It is given no jurisdiction to decide any other issue raised in the suit. Of course the Legislature could have made the matter clear by adding words to the effect that after a Tribunal has disposed of the *question* the suits shall stand re-transferred to the appropriate civil Court. But though no words expressly effecting a re-transfer have been employed that seems to be the necessary consequence of limiting the jurisdiction of the Tribunal to the determination of the specified and particular questions.

Another reason which weighed with the learned Judge was what may be called the history of the matter. The Legislature first of all enacted the Rent Reduction Act. Then it went on to pass the Estates Abolition Act of 1948. When these Acts had to be implemented, questions frequently arose as to whether any particular area was or was not an estate, or was or was not an inam estate. The Legislature considered it necessary to set up a Tribunal for the speedy and effective adjudication of the questions. It is for that purpose that Act XXX of 1956 was enacted. Therefore it is only in relation to those Acts that we can properly suppose that the Legislature intended to confer exclusive jurisdiction in the Tribunals set up under the Act. It cannot therefore be said that when such questions arise in connection with other proceedings the Legislature intended to oust the jurisdiction of the ordinary Courts.

Now, it may be that it was the desire more speedily to implement the provisions of the Rent Reduction Act and the Abolition Act that persuaded the Legislature to enact Madras Act XXX of 1956. Nevertheless the fact remains that the Legislature used words wide enough to cover every occasion on which such questions might arise for determination, and, not merely such occasions as might arise in the course of the implementation of the two Acts. It will be noted that express words are used to oust the jurisdiction of every Court other than the Tribunals constituted under section 5 or the Special Appellate Tribunal constituted under section 7, when these two questions arise for determination. Section 10 specifically provides that no civil or revenue Court and no Tribunal constituted under any other law shall have jurisdiction to decide the questions. Section 11 provides that all proceedings in which this question arose except those pending in the High Court shall be transferred to the appropriate Tribunal for the determination of the questions. The words are so comprehensive that it would not be right to say that the jurisdiction of the Tribunal would arise only in those cases where efforts are made to implement the provisions either of the Rent Reduction Act or of the Abolition Act.

Basheer Ahmed Sayeed, J., in *Muthiah* v. *State of Madras*[1] did not give any other reason for taking the view he did.

For the reasons given we overrule the decision of Ramachandra Iyer, J. and Basheer Ahmed Sayeed, J. and allow these Revision Petitions.

The suits will stand transferred to the Estates Abolition Tribunal at Madurai, with jurisdiction over Tirunelveli District for the determination of the questions already indicated. After the Tribunal has given its finding son those issues, the suits will go back to the District Munsif, Ambasamudram, for their being disposed of in accordance with law after determining, if necessary, the other issues.

There will be no order as to costs.

R.M. *Petitions allowed.*

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1. (1959) 72 L.W. 249.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE JAGADISAN.

M. S. N. S. Transports, Tiruchirappalli by Proprietor, M. S. N. Shanmugham Pillai .. *Appellant**

v.

K. Rajaram, by Secretary, Motor Transport and General Workers' Union, Tiruchirappalli and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Scope of jurisdiction of labour Court under—Payment of Wages Act (IV of 1936)—Back wages of workman reinstated by award—If within the Act.

Section 33-C (2) of the Industrial Disputes Act is wide enough to cover cases where an award gives a benefit to a workman, such as the benefits of back wages, without specifying the amount and it is open to the Labour Court in such cases to determine the amount on the application of the workman. The term ' back-wages ' in such cases is used to describe the benefit awarded to the workman who was without employment and it cannot be said that such a claim of back-wages amount to claim for wages within the meaning of the Payment of Wages Act.

Appeal under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 3rd April, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 114 of 1959 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to Claim Petition No. 7 of 1957 on the file of the Labour Court, Madurai, and quash the order, dated 13th June, 1958, therein.

K. Parasaran, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The only point pressed upon us by learned counsel for the appellant is that the Labour Court had no jurisdiction to entertain the petition filed by the workman for fixing the amount payable to him as back wages in consequence of the award of the Labour Court dated 11th September, 1954, in and by which the management was directed to reinstate the workman with back wages. The contention was that the matter really fell within the province of section 15 of the Payment of Wages Act and the workman should have moved the authority specified in that section for the relief he sought and, therefore, the Labour Court had no jurisdiction in the matter. In our opinion the contention cannot be accepted for two reasons: Firstly we think that section 33-C (2) of the Industrial Disputes Act is wide enough to cover a case like this where the award of a Labour Court merely gave a benefit to the workman, namely, the benefit of back wages, without specifying the amount the workman had become entitled to receive from the employer. This benefit is certainly one in respect of which the worker could apply to the Labour Court for determination of the actual amount. Secondly we think that though the term " back wages " is used to describe the benefit being awarded to the workman who has been without employment till the reinstatement, the claim would not be a claim to wages which fell within the scope of the Payment of Wages Act. We, therefore, hold that the Labour Court has jurisdiction to entertain the petition filed by the workman. In the result the appeal is dismissed.

R.M. *Appeal dismissed.*

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*W.A. No. 133 of 1959. 22nd December, 1959. (1st Pausa, 1881—Saka.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

N. Chellaperumal Chetty .. *Appellant**

v.

N. M. Jayarathnam Chettiar .. *Respondent.*

Negotiable Instruments Act (XXVI of 1881)—Promissory note—Chit-fund transaction—Promissory note executed by a subscriber-bidder for future instalments—If enforceable as a negotiable instrument.

In cases where a subscriber to a chit-fund transaction purchases the chit and executes a promissory note in favour of the company for the future instalments payable by him, it is not correct to say that the promissory note is only a security and is unenforceable. The true legal position is that the liability of the subscriber to pay the amount in instalments for a specified period is converted into a liability to pay under the promissory note. At this stage the relationship between the chit-fund and the subscriber is only that of a creditor and debtor. The liability to pay the amount is only under the promissory note though there is usually a tacit understanding that the promissory note would be deemed to be discharged if the subscriber pays the future instalments periodically for the entire period agreed upon. There is no bar to the enforcement of the liability under the promissory note as such.

Appeal against the Decree of the City Civil Court (Additional) Madras in A.S. No. 29 of 1956, preferred against the decree of the City Civil Court, Madras, Sixth Assistant Judge, in O.S. No. 1462 of 1953.

R. Narasimhachari and *N. Varadarajan,* for Appellant.

D. Ramaswami Ayyangar and *C. Krishnamachariar,* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff appeals from the judgment and decree of the Additional City Civil Judge, Madras, in A.S. No. 29 of 1956 on his file. The learned Judge allowed the appeal preferred by the defendant from the judgment and decree of the Sixth Assistant Judge on the file of that Court in O.S. No. 1462 of 1953, and dismissed the plaintiff's suit with costs.

There was a public limited company known as the Conjeevaram Funds, Limited. The company was conducting chits. The defendant was subscribing to a chit conducted by the company in the years 1949-53. The chit commenced in April, 1949. The defendant subscribed to five tickets in that chit. The amount payable per ticket per month was Rs. 30. The duration of the chit was for forty months. The defendant paid the amount for the five tickets for five months. In September, 1949, he purchased the chit and had to pay Rs. 5,250 on account of the remaining 35 instalments of the chit. He had to pay Rs. 150 per instalment. The total sum payable by him was Rs. 5,250. For that sum of Rs. 5,250, he executed a promissory note, Exhibit A-1, in favour of the company.

The plaintiff was another subscriber in the same chit. He had subscribed to the chit fully and had not been paid the money due to him. On 13th October, 1952, he instituted an Original Petition on the file of this Court for having the company wound up. The petition was being adjourned from time to time for settlement. On 11th March, 1953, the company endorsed in favour of the plaintiff the promissory note for Rs. 5,250 which the defendant had executed on 5th September, 1949. The plaintiff reported to this Court on 12th March, 1953, that his petition for having the company wound up was not pressed. The petition was dismissed on that date.

The plaintiff instituted the suit out of which the second appeal arises, for recovery of the sum due on the promissory note. After the execution of the promissory note, the defendant paid some instalments of the chit. The amount payable on the promissory note on the date of the endorsement, 11th March, 1953, was Rs. 2,395. The plaintiff prayed for recovery of that sum with interest from the date of the endorsement.

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*S.A. No. 8 of 1958. 10th September, 1959.
(19th Bhadra, 1881—Saka).

The learned Sixth Assistant Judge, City Civil Court, Madras, decreed the suit as prayed for. The decree was reversed in appeal by the learned Additional Judge, City Civil Court at Madras. The suit was dismissed.

The learned Additional Judge held that the plaintiff was not entitled to sue on the promissory note and recover any money. The learned Judge's view was that the promissory note was executed as security for the payment of the money due on the future instalments of the chit and that the plaintiff, by obtaining the promissory note on endorsement, obtained nothing. The learned Additional Judge thought that, while the Fund might have been entitled to sue on the debt due on the chit and secured by the promissory note, the defendant could be sued by the plaintiff for the recovery of the money in the event only of his obtaining an assignment of the debt in addition to getting the promissory note endorsed. That is a view which is plainly wrong.

The defendant executed the promissory note for money payable to the chit fund. It is an error to call the promissory note, security. It is a grievous error to say that, being mere security, the promissory note could not be enforced at all. The liability to the Company to pay Rs. 5,250 in 35 instalments was converted into the promissory note which the company took from the defendant. Thereafter, there was no liability on the part of the defendant to the company other than the liability which could be enforced under the promissory note. There was no independent written agreement on the part of the defendant to pay any sum of money to the Company on account of the future instalments of the chit. There was, however, an oral agreement that the promissory note would be deemed to be discharged in the event of payment of Rs. 150 every month during the next 35 months. After the execution of the promissory note, the relationship between the parties, *viz.*, the Conjeeveram Funds, Limited and the defendant, as creditor and debtor, was this. The defendant owed money on the promissory note and that liability enforceable under the promissory note would be discharged by payment of Rs. 150 every month during the succeeding 35 months. If the defendant paid no money after the execution of the promissory note, the company could institute a suit only on the promissory note and not on the basis of the initial agreement relating to the chit. In suing on the promissory note, the Company would have to give credit to all the sums received as for the chit and sue only for the recovery of the money which would be outstanding after giving credit to those sums. If, for example, three instalments were paid subsequent to the execution of the promissory note, Rs. 450 would have to be credited and Rs. 5,250 *minus* Rs. 450 alone could be claimed as principal outstanding on the promissory note.

So long as the defendant does not plead that the promissory note was nominal or that no liability was intended to be incurred under it, he cannot be allowed to plead that the promissory note was mere security for some other liability, or that it was not enforceable. Evidence seeking to prove any such plea would be barred under section 92 of the Evidence Act.

I find that the defendant was bound to pay the Company the money due under the promissory note and that the promissory note represented enforceable liability.

In taking the view that, in obtaining the promissory note on endorsement, the plaintiff obtained nothing, the learned Additional Judge appears to have been misled by the analogy of endorsement of a promissory note executed by the manager of a joint Hindu family for a debt borrowed by him for family necessity. The promissory note embodies merely his own personal promise to pay the money. It does not contain a promise on his part to pay the money also out of the joint family properties. Where the payee in such a case endorses the promissory note, the endorsee obtains the right to enforce the personal promise. He does not, by reason merely of the endorsement, obtain the right to enforce the managing member's liability to pay the debt also out of the joint family property belonging to him and the other members of the family. That is because the endorsement operates only on the liability which is apparent on the face of the instrument. It is part of the

general law of negotiable instruments that nothing passes by an endorsement of a negotiable instrument except such liability as one may recognise on the face of the instrument. In the present case, the liability which the plaintiff seeks to enforce is the liability which is apparent on the face of the promissory note.

The defendant's liability to pay the money stated in the document appears on its face. That liability was transferred to the plaintiff by the endorsement. He does not seek to enforce any further or other liability. *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1] has no bearing on the questions that arise for determination in this case.

I find that the endorsement being in favour of the plaintiff he has obtained the right to enforce the promissory note and recover whatever money was payable by the defendant, under it, to the Company.

The plaintiff does not state that he is a holder in due course, entitled to recover any money which the Company could not itself recover. The discussion about the plaintiff being a holder in due course does not arise on the pleadings.

The learned Additional Judge held, further, that the suit was barred by limitation. For saving limitation, the plaintiff relied on Exhibit A-4 and Exhibit A-5. Exhibit A-5 is a chalan signed by the defendant on 26th February, 1951, for payment of Rs. 150 to the Company. That sum was paid to his credit in the chit account. The learned Additional City Civil Judge held that that payment could not save limitation under section 20 of the Limitation Act because the payment was made towards the debt due on the chit. That mistake followed on the learned Judge's view that the promissory note was mere security. The expression "security", as I have attempted to show, does not make meaning with reference to the facts of this case. The promissory note was itself the document under which the defendant was liable to pay whatever money was payable by him to the Company on account of the chit transactions. Sums which, subsequent to the execution of the promissory note, the defendant paid into the chit account had to be credited towards the liability on the promissory note. Whatever sum was credited in the chit account was a sum paid towards the debt due under the promissory note. The sum of R. 150 paid by the defendant on 26th February, 1951, was a sum which was paid in reduction of his liability on the promissory note. Being a payment in reduction of the liability under a document which bears the defendant's signature, it is a payment which, under section 20 of the Limitation Act saves the suit from the bar of limitation.

Exhibit A-4 is a letter by the defendant to the Company written on 20th January, 1953. In that letter, the defendant asked for further time to make payment. He said, "I shall soon bring the money and pay. Therefore please do not blame me. Please excuse me." The defendant's evidence shows that, by that letter, the defendant asked for time for paying the money due on the chit account.

The respondent's learned counsel argued that oral evidence is not admissible to prove that the money which the defendant promised to pay was money payable on the chit account, that is to say, in reduction of the liability on the promissory note. Whether oral evidence could be admitted to explain the contents of a document depends upon the degree of formality of the document. Exhibit A-4 is a letter. It was not intended to be formally complete. Therefore, reference in that letter to money, payment, etc., could be explained by oral evidence. I find that Exhibit A-4 contains an acknowledgment of the defendant's liability on the chit account, that is to say, liability under the promissory note.

The learned Additional City Civil Judge's finding that the suit is barred by limitation is not sustainable. It is hereby set aside. I find the suit is in time.

The argument that the endorsement in favour of the plaintiff was void by reason of certain winding up proceedings does not appear to be maintainable. The plaintiff filed an Original Petition on 13th October, 1952, on the file of this Court for having

1. (1938) 1 M.L.J. 378 : I.L.R. (1938) Mad. 568.

the Company wound up. He obtained the promissory note on endorsement on 11th March, 1953 and did not press the petition. It was dismissed on 12th March, 1953. Another creditor filed a petition on the 19th March for winding up the Company. The company was wound up, on that petition, by an order passed on 21st September, 1953. There is no evidence as to whether the winding up proceedings have terminated and if so how. Learned counsel for the respondent says that the petition filed on 19th March, 1953, should be deemed to be a continuation of the petition which was dismissed on the 12th March and that therefore the endorsement made in favour of the plaintiff should be held to be void. There is no authority in support of that proposition. Nor am I able to recognise any principle on the basis of which one might hold that the petition which was dismissed on 12th March would be deemed to have been pending and continued by the petition presented on 19th March.

The appeal is allowed. The suit is decreed as prayed for. The plaintiff will have his Costs in both the Courts below, and, the Court-fee on the memorandum of second appeal. Otherwise the parties will bear their own costs in the second appeal.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA AYYAR.

Messrs. Sreenivas & Co. .. *Appellants**

v.

The Deputy Commercial Tax Officer, Moore Market Division .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), sections 3 and 5 and Turnover and Assessment Rules, rules 15 and 16—Levy of sales-tax on hides and skins—Rules are charging provisions and part of the law imposing tax—Constitution of India, (1950), Article 286 (3)—Assent of the President under—Not necessary for the validity of the above rules where the Act was passed prior to Constitution—Writ under Article 226 of the Constitution.

A taxing enactment generally contains provisions regarding the levy, assessment and recovery. In the provisions of an enactment relating to the levy of sales-tax there are three constituent elements : (1) Enumeration or selection of the goods, that is, the provision which determines the goods upon which tax is leviable; (2) specification of the rates of duty; and (3) specification of the transaction or transactions which attract tax liability, *e.g.*, whether it is single point or multipoint. The first two are provided for by sections 3 and 5 (vi) of the Act, in so far as the tax relates to the sale of hides and skins. The last is provided for by rule 16 of the Turnover and Assessment Rules. The rule determines in respect of which and by whom is the fixed point tax to be paid. Liability would, therefore accrue only if the point has been fixed. As in a sales tax the occasion or event is an important constituent element to attract tax liability, the specification of the point should be construed as part of the charging provision and not a mere machinery one. But for that specification, there would be no liability at all of the dealer to pay the tax. Rule 16 sholud therefore be considered an integral part of the charging provisions and be part of the law imposing a tax.

The decision of the Australian Courts which interpreted the words 'law imposing a tax' in the light of the constitutional practice of that country cannot be of guidance in the interpretation of similar words in Article 286 (3) of the Indian Constitution.

The Madras General Sales Tax Act, 1939, is of a composite character in that it could be a law imposing the tax in regard to the sale of most of the commodities and in case of hides and skins (and goods similarly placed by section 5) the relevant Turnover and Assessment Rules would also be the charging provisions, the Act should be held to be merely one authorising the imposition of tax in regard to such goods. The Madras General Sales Tax Act, 1939, was passed by the State Legislature long prior to the Constitution of India (1950). Rules 15 and 16 of the Turnover and Assessment Rules were made by the State Government by virtue of sections 3, 5 and 19 of the main Act and though they came into force only on 9th August, 1955, they should be held to be part of that Act as valid delegated legislation and would not require the assent of the President for their validity.

Rules 15 and 16 of the Turnover and Assessment Rules cannot be held to be invalid as being contrary to the provisions of Article 286 (3) of the Constitution.

Case-law discussed.

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* W.A. No. 15, 16 and 18 of 1958. 16th October, 1959.

Appeals under clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopala Ayyangar, dated 25th November, 1957 and made in the exercise of Special Original Jurisdiction of the High Court in W.P. Nos. 1287 and 1288 of 1956, respectively, presented to the High Court under Article 226 of the Constitution of India for the issue of writ of *mandamus* or other appropriate writ directing the respondents to forbear from enforcing the provisions and rules of the Madras General Sales Tax Act of 1938 as amended from time to time below mentioned against the petitioners after declaring them *ultra vires*, namely, sections 3 (1) (*a*), and 3 (3) of the Madras General Sales Tax Act and rule 5 of the Madras General Sales Tax Act Rules and rules 15 and 16 of the Turnover and Assessment Rules in so far as they make it obligatory on the part of every dealer in skins and hides to take out a licence, submit returns and pay tax in advance.

M. K. Nambyar for *Messrs. Soundararajan* and *Sivaswami*, for Appellant.

The Advocate-General (*V. K. Tiruvenkatachari*), and the Additional Government Pleader (*M. M. Ismail*) on behalf of the Respondents.

The Order of the Court was made by

Ramachandra Ayyar, J.—These appeals, which are filed under clause 15 of the Letters Patent against the judgment of Rajagopala Ayyangar, J., in W.P. Nos. 1287, 1288 and 1469 of 1956, raise a common question relating to the constitutional validity of the revised rules 15 and 16 of the Turnover and Assessment Rules, made by the Government of Madras under sections 3, 5 and 19 of the Madras General Sales Tax Act, 1939, and published in the *Fort St. George Gazette*, on 7th September, 1955. The appellants in the various appeals are tanners and dealers in hides and skins, tanned and untanned. The respondent in the respective appeals issued notices to them, calling upon them to submit returns, and pay tax in advance in accordance with rule 5 of the Madras General Sales Tax Rules and the revised rules 15 and 16 of the Turnover and Assessment Rules. The appellants, therefore, moved this Court by means of the petitions aforesaid for the issue of a writ under Article 226 of the Constitution to direct the respondent to forbear from enforcing the rules, after declaring them illegal. The case for the appellants is that rules 15 and 16 of the Turnover and Assessment Rules, which were published on 7th September, 1955, were invalid, as being contrary to the provisions of Article 286 (3) of the Constitution before the Amendment.

The Madras General Sales Tax Act, 1939, authorises the State to impose a tax on the sale of goods. Under section 3 of the Act, the tax is levied on an annual turnover of a dealer, which comprises the sale or in certain cases the purchase price of the goods. The tax being leviable on the occasion of a sale of a particular article, there could on the terms of that provision, be as many levies as there were sales of that commodity within the State of Madras, resulting in a multi-point levy on the same article. The Act provided exemptions and reductions in certain cases. Dealers having an annual turnover of less than Rs. 10,000 were exempted. Certain goods, for example, handwoven clothes were totally exempted. In regard to certain others, the multi-point levy was avoided by a scheme of a single point levy, that is, the sales-tax being levied only on one occasion of the series of sales that may take place within the State with regard to that commodity. Section 5 provided for the cases where exemptions were granted and where the levy was confined to a single point. Hides and skins got the benefit of a single point levy. Section 3 (4) states that, for the purposes of the Act, the turnover, on which tax on sale of goods had to be ascertained, was to be in accordance with such rules as might be prescribed. Section 5 (*vi*) says that the sale of hides and skins, whether tanned or untanned, shall be liable to tax under section 3, sub-section (1) only at such single point in the series of sales by successive dealers, as may be prescribed. Thus, rules have to be framed for determining the turnover, and in the case of hides and skins, prescribing the single point in the series of sales at which the tax could be levied. Rules 15 and 16 provided for the levy of tax on hides and skins. The original rules under the Act came into force on 1st October, 1939. Various defects were noticed in the rules, and anamolies

came to light in their actual application : evasion was found possible. The learned Judge has, in his judgment, set out in detail the relevant provision of the statute and the rules and difficulties that were found in its application. The rules had to be recast, and the Government did so. In the place of the old rules 15 and 16, they made the impugned rules. The new rules came into force on 7th September, 1955.

The case for the appellants was that the rules which had the effect of imposing a tax had not, before their promulgation, been reserved for the consideration of the President under Article 286 (3) of the Constitution, and as such would be invalid.

At the time when the rules were framed, Article 286 (3) of the Constitution declared :—

> "No law made after the commencement of this Act by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any goods declared by this Act to be essential for the life of the community shall have effect, unless it has been reserved for the consideration of the President and has received his assent".

The Article prescribed that commodities declared by an Act of Parliament as essential for the life of the community throughout India should not be subject to sales-tax without the approval of the President. But, before its provisions could be made applicable, the Parliament should have declared, by law, the concerned commodity as essential for the life of the community. In such a case, no State could legislate so as to impose a sales-tax on such commodity, unless the bill was reserved for consideration of the President and received his assent. There was such a legislation by the Parliament. The Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act (LII of 1952) was enacted, and came into force on 8th August, 1952. In the schedule to the enactment, which specified the goods which were declared essential for the life of the community, item 10 related to hides and skins. Section 3 of Act LII of 1952 provided that no law of a State, which imposed or authorised the imposition of a sales-tax on goods declared as essential goods under that enactment, would be valid, unless it had been reserved for consideration by the President and received his assent.

On the dates when the impugned Rules were made and notified, Act LII of 1952 was in force, though later it was repealed. That latter circumstance, however, is of no moment to this case, as the rules, if held to be contrary to the then existing provisions of the Constitution and the Act would be invalid. According to the appellants rules 15 and 16 of the Turnover and Assessment Rules would be a law imposing, or authorising the imposition of a tax on the sale or purchase of goods, namely, hides and skins, which had been declared by Parliament to be essential to the life of the community, and that as no assent of the President was obtained previous to the promulgation of the Rules under Article 286 (3) of the Constitution, they should be held to be invalid.

Rajagopala Ayyangar, J., who disposed of the writ petitions, (the judgment is reported in *Paliniappa v. Deputy Commercial Tax Officer*[1]), held that Article 286 (3) of the Constitution imposed fetters only on post-Constitution laws, that it could not operate on the Madras General Sales Tax Act which was enacted long anterior to the Constitution, that the provisions contained in section 3 (1) and (2), as modified by section 5 of that Act, would constitute the law imposing tax, that the rest of the Act, namely, the Rules made by virtue of section 19, contained only machinery provisions for the assessment and collection of the taxes, and that, although those could be properly termed as laws dealing with sales-tax, they would not be laws imposing taxes, and as such, would not come under the ban contained in Article 286 (3).

The question, whether rules 15 and 16 of the Turnover and Assessment Rules could be held to come within the terms "imposing a tax" of Article 286 (3) was considered by the learned Judge in the light of certain decisions of the Australian High Court which held that Assessment Acts passed by the Legislatures of that country, notwithstanding that they contained provisions which brought within the charge

1. (1957) 10 S.T.C. 171.

persons or transactions, could not be held to be Acts "imposing a tax". In that view the Rules forming the machinery to make the sales-tax exigible were held not to come within the ban of Article 286 (3), as they would not be law imposing a tax strictly so called, and consequently such Rules not being " law imposing a tax ", though they came into operation at the time when the Central Act LII of 1952 was in force, would not be invalid by reason of the omission to reserve them for the consideration of and assent by the President.

Mr. M. K. Nambiar, the learned counsel for the appellants, contended that the Turnover and Assessment Rules relating to the tax on hides and skins were really taxing provisions, and not mere machinery ones. He further contended that the interpretation of the words, "a law imposing tax " adopted in the decisions of the Australian Courts, was the result of a political practice adopted in that country, and could not properly guide the interpretation of Article 286 (3) of the Constitution, and that further the Rules, having been made a part of the Act by section 19 thereof, should be deemed to be a law imposing a sales-tax by the State Legislature.

The precise nature of the old rule 16 was considered in several decisions of this Court. Those considerations would also apply to the new Rules. In *Syed Mohamed & Co.* v. *State of Madras*[1], it was held that sections 5 and 6 did not, by themselves, impose a tax on the purchaser in the case of the sale of hides and skins but left it to the rule-making authority to determine at which point, in the series of sales by successive dealers, tax should be levied. In *Hajee Abdul Shukoor & Co.* v. *State of Madras*[2], dealing with the same matter, it was observed that no turnover would be liable to be taxed until the single point in the series of taxes was fixed by the Rules, that the charging provision in section 3 would be subject, in the case of transaction in hides and skins, to the terms of section 5 (vi) under which the single point of taxation in the series of sales had to be fixed by the Rules, and that single point should be deemed to be fixed, and the liability to tax would arise only under rule 16. The decision in *Noor Nohammad* v. *State of Madras*[3], is to the similar effect. In *Munnuswami Mudaliar & Co.* v. *State of Madras*[4], the learned Judges held that the essence of a single point taxation consisted in the fixation of a single point, either by the Act itself, or under the rule-making power, if the Act so prescribed, and that, as the Act by section 5 (vi) directed the rules to prescribe the single point for taxation, no tax liability could accrue out of a sale of hides and skins, whether tanned or untanned, unless the Rules had prescribed such a single point. It was further observed that in the case of commodities like hides and skins, in respect of which a tax could be levied only at a single point to be fixed by the rules, there could be no tax liability accruing, until and unless the Rules prescribed a single point for taxation. These cases would appear to support the contention of the learned advocate for the appellants that rule 16 was a taxing, and not a mere machinery provision with respect to the sale of hides and skins. But Rajagopala Ayyangar, J., was of opinion that those cases were concerned with the problems of quite different nature from those involved in the present case and would not apply when the question had to be considered with reference to Article 286 (3).

A taxing enactment generally contains provisions regarding the levy, assessment and recovery. In the provisions of an enactment relating to the levy of a sales-tax, there are three constituent elements: (1) enumeration or selection of the goods; that is, the provision which determines the goods upon which tax is leviable; (2) specification of the rate of duty; and (3) specification of the transaction, or transactions which attract tax liability, *e.g.*, whether it is single point or multi-point. The first two are provided for by sections 3 and 5 (vi) of the Act, in so far as the tax relates to the sale of hides and skins. The last is provided for by rule 16 of the Turnover and Assessment Rules. The Rule determines in respect of which and by whom is the fixed point tax to be paid. Liability would, therefore, accrue only if the point has been fixed. As in a sales-tax the occasion or event is an important constituent element to attract tax liability, the specification of the point should be construed as part of the

1. (1952) 2 M.L.J. 598 : 3 S.T.C. 367.
2. (1955) 2 M.L.J. 494 : 6 S.T.C. 352 (F.B.).
3. (1955) 2 M.L.J. 425 : 7 S.T.C. 792.
4. (1955) 2 M.L.J. 595 : 7 S.T.C. 1.

charging provision, and not a mere machinery one. But for that specification, there would be no liability at all of the dealer to pay the tax. Rule 16 should, therefore, be considered, as the old rule 16 was considered an integral part of the charging provisions. It would, therefore, be part of the law imposing a tax.

On the question as to the precise meaning to be attributed to the words 'a law imposing taxation' in the Constitution, the learned Judge referred to three decisions of the Australian Courts: *Osborne* v. *Commonwealth*[1]; *Federal Commissioner of Taxation* v. *Munro*[2], and *Cadbury Fry Fascall Proprietary Ltd.* v. *The Federal Commissioner of Taxation*[3]. Those cases make a distinction between a law imposing a tax and mere Assessment Acts. The latter class, though it imposed a liability on certain persons, was held not to be one imposing a tax. To appreciate the decisions of the Australian Court, it is necessary to ascertain the legislative powers and practice in that country. Section 53 of the Australian Constitution Act provides that proposed laws, appropriating revenue or monies or imposing taxation, shall not originate in the Senate : that body had no power even to amend such laws, but could only suggest amendment. Section 55 provides :—

"Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

Referring to section 55, Mr. Anstey Wynes, in "Legislative, Executive and Judicial Powers in Australia", 2nd Edition states at page 246:

"This section, being in the middle of a group of sections relating to the powers of the respective Houses and parliamentary procedure, is directed to preserving the privileges of the House of Representatives with respect to finance and providing against their abuse.

The learned Author states further at page 247 :—

"A law imposing taxation is one which in itself and by itself imposes a tax : it does not necessarily comprehend every law which deals with taxation. Nor need a law be complete as to rate or subject-matter or person to be taxed in order to come within the category ; for example, a statute which merely prescribes that there shall be a land tax leving the rates and conditions to be prescribed later, would be a "law imposing taxation". A further distinction is to be noted between a law imposing taxation and a law which is interpretative, declaratory or procedural. The usual procedure adopted by the Commonwealth is to impose a tax by one Act and assess it in another ; the assessment Act is not then a "law imposing taxation". This practice has been upheld by the High Court in serveral cases."

We have referred to section 53 of the Australian Constitution under which proposed laws, appropriating revenue or money, or imposing taxation, should not originate in the Senate. The Senate has no power either to amend proposed laws imposing taxation so as to increase the burden or charge on the people. In order, therefore, to demarcate the powers of the House of Representatives and the Senate in that country, it was necessary to define within narrow limits the laws imposing taxation in respect of which alone the latter body would have controvert legislative powers. That was achieved by restricting the laws imposing a tax to the barest limits, and dealing with other matters relating to taxation by a separate enactment, so that the Senate would have full legislative poweis over them. They were called Assessment Acts, while the former was called the Taxing Act. Thus, a constitutional practice grew in that country for separating Taxation Acts from Assessment Acts. In *Cadbury Fry Fascal Proprietary Ltd.* v. *Federal Commissioner of Taxation*[3], Latham, C.J., observed at page 373:

"Parliamentary practice has given effect to these provisions by distinguishing between Tax Assessment Acts and Tax Acts in the manner stated. Acts of the former type provide means for assessing and collecting tax—give authority to officers to assess and collect the tax, and they impose duties upon persons to make returns in order to make such assessment and collection possible. The tax Acts contain the grant of money—they impose the burden upon the people. It is the latter Acts and not the former which have been regarded as imposing taxation, and therefore as not capable of originating in the Senate or of being amended by the Senate.

This practice has been recognized by this Court as carrying out the constitutional provisions upon a correct basis. It has been held on several occasions, that various Assessment Acts do not

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1. 12 C.L.R. 321.
2. 38 C.L.R. 153.
3. 70 C.L.R. 362.

impose taxation, and it has been so held though such Acts contain provisions that a person should be liable to pay tax or be chargeable with tax."

In *Moore* v. *The Common wealth*[1], it was observed :—

"The separation of the Acts is a tried and venerated procedure for escaping the hitherto ineffectual menaces of section 55".

In *Moran Proprietary Ltd.* v. *N. S. W. Tax Commissioner*[2], the Privy Council observed :—

"Laws imposing taxation must deal with one subject of taxation only (section 53 of the Constitution of the Commonwealth), and the established practice in Australia is to follow the Taxation Act with an " assessment " Act providing for the collection and recovery of the tax, for exemptions and for refunds in appropriate cases."

Therefore, the limited meaning given to 'a law imposing a tax' adopted by the Australian cases was not so much the result of any statutory or judicial definition of the terms, but mainly dictated by the constitutional procedure of that country. The decisions of the Australian Courts which interpreted the words 'law imposing tax' in the light of the constitutional practice of that country cannot, therefore, really guide us in the interpretation of similar words in Article 286 (3) of our Constitution.

But that conclusion would not be enough to dispose of the appeals. Another line of reasoning would, in our opinion, support the conclusion arrived at by the learned Judge in these cases.

Article 286 (3) refers to two types of cases: (1) a law by the Legislature of a State imposing taxation, and (2) a law by the Legislature of a State authorising imposition of taxation. The former case will be one where the enactment imposed taxation *proprio vigore*, that is, directly by its own terms. On the other hand, the expression 'authorising imposition of tax' would apply to a case where the Legislature lawfully vested another body with a power to make a law imposing a tax. Illustrations of the latter type are where a municipal or local authority is permitted to legislate with regard to imposition of certain taxes; customs duties imposed by the executive Government by a notification. A law levying taxes may, thus, be in absolutely complete form, or it may be in a form which needs some further provision or further action to make it complete or operative. In such cases, it would properly be a law authorising imposition of tax, because the exigibility of tax would depend upon further provisions being made. Such an enactment would be one authorising the imposition of a tax, not one itself imposing tax. The Madras General Sales Tax Act, 1939, is of a composite character. It could be a law imposing the tax in regard to the sale of most of the commodities. By reason of our conclusion, that in the case of hides and skins (and goods similarly placed by section 5), the relevant Turnover and Assessment Rules would also be the charging provision, the Act should be held to be merely one authorising the imposition of a tax in regard to such goods. But both types of legislation would be covered by Article 286 (3) of the Constitution. If, therefore, after the passing of Act LII of 1952, Sales Tax legislation was enacted in regard to the commodities declared by the former Act, it would require the assent of the President, notwithstanding the fact that it merely authorised imposition of the tax.

The learned advocate for the appellants contended that as the Rules framed under the Act are deemed to be part of the Act under section 19 (5), the Rules should themselves be held to be a legislative enactment which would come within the ban of Article 286 (3). Section 19 (5) creates a fiction that the Rules, though not passed by the Legislature, are deemed to be so passed. That would only confirm the view that they are not really a law by the Legislature of the State, but only deemed to be such for the purpose of the enforcement of the Act.

The restriction imposed by Article 286 (3) is only with respect to the law imposing sales tax by the Legislature of a State. A law directly imposing a sales tax, or one authorising such imposition, passed by the State Legislature, if passed during the time when Act LII of 1952 was in force in order to be valid would have to comply

1. 82 C.L.R. 547 at 569.   2. (1940) 3 A.E.R. 269 at 274.

with the requirements of Article 286 (3). But can the impugned rules 15 and 16 though amounting to a charging provision, be held to be a law of the Legislature of the State? *Prima facie* it would appear that cannot be so. In the case of a State legislation, which authorised the levy of a tax to a delegated authority, the assent of the President given to the main Act should be held to cover the delegation as well, and the subsequent delegated legislation, would also be covered by the President's assent, if one was necessary. It would follow that, if the original Act did not require the President's assent under Article 286 (3) as having been passed before the Constitution or at a time when there was no legislation by the Parliament regarding essential commodities, the subordinate or delegated legislation, which should be deemed to be part of that Act, should not require assent.

The Madras General Sales Tax Act, 1939, was passed by the State Legislature long prior to the Constitution. Rules 15 and 16 were made by the State Government by virtue of sections 3, 5 and 19 of the Act, and, though they came into force only on 9th August, 1955, they should be held to be part of that Act, as valid delegated legislation and would not require the assent of the President for their validity. This principle is supported by authority. In *Singh* v. *State of Pepsu*[1] and in *Firm of Gowri Shankar* v. *Sales Tax Officer, Secunderabad*[2], it was held that Article 286 (3) contemplated a law passed by the State after the Parliamentary law declared the goods as essential commodities. The law so passed could therefore only be a statute law and not any subordinate legislation. A similar question arose under Article 305 of the Constitution in *Kutti Koya* v. *State of Madras*[3], where the question was whether the notification, which extended the provisions of the Madras Commercial Crops Markets Act (XX of 1933) to certain places after the Constitution came into force, contravened Articles 302 and 304 (*a*). It was held that the Madras Commercial Crops Markets Act would be an "existing" law, as it was passed before the Constitution by an authority competent to enact it, and the fact, that its operation had not been extended before the coming into force of the Constitution, would not be material for the purpose of the definition. In *Surajmal* v. *State of Rajasthan*[4], rules and bye-laws were framed by the municipality imposing *octroi* duty after the Constitution, under the Jaipur Municipal Act which was passed prior to the Constitution. It was held that the rules and bye-laws were not invalid, as contrary to Article 305. Wanchoo, C.J., observed :—

> "The present wording of Article 305, in our opinion, clearly shows that the intention was to save the provisions of the existing law, and if these provisions authorise a Municipal Board for example to frame bye-laws and impose *octroi* duty, the power to frame such bye-laws and impose such duty in future was also saved......"

We are of opinion that rules 15 and 16 of Turnover and Assessment Rules, being only subordinate legislation, though imposing a tax in regard to an essential commodity covered by Act LII of 1952, could not be said to be a law passed by the State Legislature imposing a tax after the Constitution comes into force, and that therefore, there was no necessity to reserve it for the consideration and assent of the President.

The learned Advocate-General raised two further contentions. One was that the Act, providing a complete machinery for the assessment and collection of sales tax, was enacted, and the Rules thereunder were framed long prior to the passing of Act LII of 1952, and a mere substitution of a new rule in the place of an old one would not attract the provisions of Article 286 (3). In this connection, he pointed out that, in view of the fact that the taking out of a licence by a dealer of hides and skins having been made compulsory, there was really no difference between the old Rules and the new Rules. The second contention was that, even if the new Rules were held to be bad, the old Rules would still remain, as not having been properly been repealed. We think that it is unnecessary to deal with these contentions, in

1. (1954) S.C.J. 394 : 1954 S.C.R. 955 : A.I.R. 1954 S.C. 311 (S.C.).
2. (1958) 9 S.T.C. 407.
3. (1954) 1 M.L.J. 117 : A.I.R. 1954 Mad. 621.
4. A.I.R. 1954 Raj. 260, 263.

view of our conclusion that Article 286 (3) would not apply to this case of subordinate legislation.

The appeals fail, and are dismissed with costs. Counsel's fee Rs. 100 in each appeal.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE SUBRAHMANYAM.

Ganapathi Pandaram and another .. *Petitioners**

v.

The Collector of Coimbatore and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 35—*Right of resumption and regrant of inam granted for the performance of any charity and service—Nature of proceedings before the Collector under section* 35.

Limitation Act (IX of 1908), *section* 28—*Scope and applicability—Essential conditions.*

Section 44-B was introduced in Madras Act II of 1927 by Act XI of 1934 and section 35 of Act XIX of 1951 takes the place of section 44-B of Madras Act II of 1927. Under section 44-B (2) of Act II of 1927 the Collector in certain circumstances had the power to resume an inam and regrant it.

Assuming that the Government's right to resume a land granted in inam for the purpose of service connected with a temple and to regrant the land to the temple for the performance of the service can be extinguished by adverse possession on the part of a person unconnected with the temple or the service, such adverse possession should have lasted for the last 60 years before the commencement of section 44-B of Madras Act II of 1927.

The proceedings before the Collector under section 44-B (2) of Madras Act II of 1927 or under section 35 (2) of the Act XIX of 1951 are not in the nature of a suit, to which the provisions of Articles 130 and 149 and section 28 of the Limitation Act can be applied.

The essential condition for the application of section 28 of the Limitation Act is the right of aggrieved person to institute a suit for the possession of the property concerned. If the right of such person to institute a suit for possession is expressly or by necessary implication barred by statute section 28 cannot be invoked and there can be no extinguishment of the title of such person to the property concerned.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Collector of Coimbatore (first Respondent herein) in his proceedings in R. Dis. No. 30402/56, dated 14th February, 1957, reversing the Order of the Sub-Collector, Pollachi, in R. Dis. No. 18426/55-F, dated 31st October, 1956, in Inam Enquiry No. 1 of 1956 on the file of the Sub-Collector, of Pollachi and quash the said order of the Collector of Coimbatore, dated 14th February, 1957 in the said R. Dis. No. 30402 of 1956.

The Advocate-General (*V. K. Tiruvenkatachari*) and *M. Natesan*, for Petitioners.

The Additional Government Pleader (*M. M. Ismail*), *V. Vedantachari* and *R. Rajagopalan*, for Respondents.

The Order of the Court was made by

Subrahmanyam, J.—This is a petition under Article 226 of the Constitution by the hereditary trustees and poojaris of the Vellai Vinayagar temple of Puliampatti, Palladam Taluk, Coimbatore District, for the issue of a writ of *certiorari* to remove the order passed by the District Collector on 14th February, 1957, in R. Dis. No. 30402 of 1956 to the file of this Court and to quash the said order.

S. No. 50 in Puliampatti Village, known as Andikadu had been granted as Devadayam Inam by a King of Mysore for the support of the Pagoda of Vellai Vinayagar. At the time of Inam Commission proceedings, Poojari Pangi Andi was in possession of the inam. The Inam Commissioner confirmed the inam permanently to the Pagoda so long as it was well kept up and issued on 19th December,

*W. P. No. 434 of 1957. 14th December, 1959, (23rd Agrahayana, 1881—Saka).

1863, inam title deed No. 1076 in the name of Pangi Andi, Poojari of the temple. In 1956 the land was in the possession of respondents 4 and 5. The Sub-Collector of Pollachi, exercising the powers of Collector under section 35 (2) of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) initiated proceedings *suo motu* for resumption of the land. Notice was issued (1) to the authorities constituted under the Hindu Religious and Charitable Endowments Act having jurisdiction over the area; (2) to the persons who were at that time poojaris and trustees of the temple and (3) to respondents 4 and 5. The 5th respondent filed a written statement that she found that the land was inam land granted for the service of pooja in the temple and that she had no objection to the land being resumed and regranted. The 4th respondent filed a statement of objections making the following allegations. The inam land, namely, S. No. 50, belonged to his ancestors and had been in the possession of the family for about 150 years. The 5th respondent was his great grandfather's brother's grandson's wife. His branch of the family was entitled to a half share in the land and her branch of the family to the other half. He was in separate possession of a half of the land, about 5½ acres in extent, as full owner and she was in possession of the other half of the land. The members of the family had never paid any quit rent or jodi nor had they paid any rent to the authorities of the temple. On those allegations, he pleaded that he was the owner of the land in his possession and that, at any rate, he had acquired title to that land by adverse possession on the part of himself and his predecessors-in-title. The Sub-Collector (hereinafter referred to as the Collector) after enquiry held that the land was Devadayam Inam land granted to the poojari of Vellai Vinayagar temple for doing pooja in the temple; that the respondents were in possession and enjoyment of the land, that they had not shown cause against resumption of the inam land, that Chinna Andi and Ganapathi Pandaram were the grandsons of Pangi Andi in whose name title deed 1076 was issued on 19th December, 1863 and that they were the poojaris of the temple at the time of the order. On those findings the Sub-Collector ordered resumption of the inam land and re-grant of it to Chinna Andi Pandaram and Ganapathi Pandaram, who were trustees and poojaris of the temple, for the performance of pooja in the temple.

Against the order of the Sub-Collector, the 4th respondent appealed to the District Collector under section 35 (2) (*d*) of the Act. The District Collector held that the property had been in the possession of the appellant's family for 60 years prior to 30th September, 1951, the date of commencement of Madras Act XIX of 1951, that the appellant had acquired title by adverse possession—and that the Collector had no power to resume the kudiwaram of the inam land. In regard to the melwaram or the assessment the District Collector held that there was no period of limitation for the exercise by the Government of the right to impose assessment. In that view, he set aside the order of the Sub-Collector in so far as the order of the resumption of the land and regrant of the same to Chinna Andi Pandaram and Ganapathi Pandaram, trustees and poojaris of the temple was concerned and left it to the Collector to consider by independent proceedings the question of imposing assessment of the land. The trustees and poojaris in whose favour re-grant was ordered by the Collector file this petition praying that the District Collector's order be quashed.

In holding that the members of the 4th respondent's family had been in possession of the inam land for 60 years before 30th September, 1951, the District Collector did not act on the oral evidence of the 4th respondent, who said that the land had been in the possession and enjoyment of his family for about 150 years. He was 56 years old in 1956 and could not have personal knowledge of possession and enjoyment before, say, 1910. He said that his mother had told him about possession and enjoyment of the land. The mother was alive and was not called.

The District Collector based his finding of adverse possession on the hypothecation deed executed by the 4th respondent's father in 1899 and the deed of partition entered into on 16th March, 1892, between the 5th respondent's fatherin-law and his father. The District Collector held that in order that the 4th respondent might ucceed in his contention of having acquired title by adverse possession to defeat

the Government's right of resumption, the 4th respondent would have to prove adverse possession for at least 60 years ending with 30th September, 1951, that is to say, adverse possession commencing not later than 30th September, 1891. According to the District Collector, the documents produced proved adverse possession from 16th March, 1892. The partition deed, dated 16th March, 1892, stated that the properties, which were being divided and which included inam land, were the 5th respondent's father-in-law's ancestral and self-acquired properties. The inam land which was divided by that document between the father and the son consisted of the southern six acres of S. No. 50, which is 10-41 acres in extent. Of the southern six acres, the northern parcel, three acres, was allotted to the father's share and the southern parcel to the son's share. The father's share was stated to be south of the land of Maniyam Kasturi Naicken. Maniyam Kasturi Naicken was the father of the 4th respondent. According to the partition deed, the land in Kasturi Naicken's possession would be 4.41 acres in extent. In the mortgage deed, dated 25th February, 1899, a half of S. No. 50 was mortgaged along with other properties. The mortgage deed also stated that the properties mortgaged consisted of the mortgagor's ancestral and self-acquired properties. There was no evidence before the District Collector that the inam land S. No. 50 was one of the properties claimed either under the partition deed or under the hypothecation deed to be ancestral properties. The District Collector said that, since the document of 1892 referred to ancestral as well as self-acquired properties in general, there was a natural presumption that this inam land among others should have come into the possession of the family at least some years prior to that date. On the basis of what he called that natural presumption, he found that the properties of the 4th respondent's family has been in the possession of the family from before 30th September, 1891, claiming to be owners thereof.

In holding that the recitals in the partition deed gave rise to a natural presumption that the property had been in the possession of the family for at least some years before that date, the District Collector was plainly in error. Assuming that the Government's power of resumption could in this case, be defeated by adverse possession on the part of a person in the position of the 4th respondent for 60 years ending with 30th September, 1951, there was no evidence of such possession before the District Collector, and his order is liable to be quashed on that ground.

The District Collector chose the date 30th September, 1951, as the date beyond which adverse possession could be of no avail as against the Government by reason of section 94 of the Madras Act (XIX of 1951). Section 94 enacts—

"Nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor-in-title before the commencement of this Act."

The District Collector held that, if by 30th September, 1951, the 4th respondent had not acquired title by adverse possession, he could not thereafter, by reason of adverse possession, acquire title which would be effective against the Government's power of resumption. If the District Collector is right in his view that the power of the Government to resume the land could be defeated by adverse possession on the part of the 4th respondent and his predecessors-in-title, the period of 60 years of such adverse possession should be counted not immediately before 30th September, 1951, but immediately before the coming into force of Madras Act (XI of 1934), which introduced section 44-B in Madras Act (II of 1927). The Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) repealed and superseded the Madras Hindu Religious Endowments Act, 1927 (Madras Act II of 1927). Section 44-B was introduced in Madras Act (II of 1927) by Amending Act (XI of 1934). In Madras Act (XIX of 1951), section 35 takes the place of section 44-B of Madras Act (II of 1927). Under section 44-B (2) of Madras (Act II of 1927), the Collector had power, either on his own motion or on the application of the persons specified in that section, to resume an inam and regrant it. The order passed by the Collector resuming and regranting the inam could be executed by him in the manner prescribed.

The argument in support of the view, that by 60 years adverse possession on the part of a person in the position of the 4th respondent, the Government's right to resume the inam is defeated may be thus stated. The inam was granted for the performance of pooja in the temple. The land could be held by the poojari so long as the temple was in existence and he was doing pooja. If the land got into the possession of a person who was not a poojari and such person made no contribution towards the performance of the pooja or the maintenance of the poojari while the temple was in existence and pooja was being regularly performed, the inam became liable to be resumed by the Government. Unless the person in possession surrendered possession to the Government, the Government should for resuming such inam, institute a suit in the civil Court having jurisdiction. Such suit would, for purposes of limitation, be governed by Articles 130 and 149 of the Limitation Act. Such a suit would become barred on the expiry of 60 years from the date on which adverse possession commenced. The suit if instituted would in essence be a suit for possession. Failure to institute such a suit would bring in the consequences enacted in section 28 of the Limitation Act, which is in these terms :

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

The result is that, on the expiry of 60 years from the commencement of adverse possession, the Government's right to resume the land gets extinguished.

The argument set out above is centred on section 28 of the Limitation Act. The essential condition for the application of section 28 is the right of an aggrieved person to institute a suit for possession of the property concerned. If the right of such person to institute a suit for possession is expressly or by necessary implication barred by statute, section 28 cannot be invoked and there can be no extinguishment of the title of such person to the property concerned. For an application of that principle, please see *Sreenivasa Varadachari* v. *Narasinga Pillai*[1].

Section 44-B (2) of Madras Act (II of 1927) enacts that the Collector may, on his own motion or on the application of any of the persons mentioned in that section, pass an order directing the resumption and regrant of the inam which is not serving the purposes for which it had been granted. Since that method of enforcement of the Government's right to resumption and regrant is expressly provided by the Legislature, the Government's right of suing to enforce its right to resume and regrant the land, in cases to which section 44-B (2) applies, is by, necessary implication, barred. It follows that, if the Government's right to resume and regrant the land had not been extinguished when section 44-B (2) of Madras Act (II of 1927) came into force, such right could not be extinguished thereafter by the operation of section 28 of the Limitation Act. That would be the position even if we assume that there could be extinguishment of such right by reason of adverse possession prior to the enactment of section 44-B (2).

The respondents' learned counsel contends that the proceedings before the Collector under section 44-B (2) are themselves in the nature of a suit, to which the provisions of Articles 130 and 149 and section 28 of the Limitation Act become applicable. Learned counsel says that the Collector, acting under section 44-B (2) (*a*), is a Revenue Court and that, in proceedings under that section, the Government should be regarded as the plaintiff.

Several statutes dealing with matters concerning public welfare vest powers in designated officers for determining questions which might affect rights of citizens. In every such case, such officers have to act judicially after giving notice to the persons likely to be affected and after giving them opportunity of adducing evidence and of being heard. Whenever an officer has legal authority to determine questions affecting rights of citizens, he is under an obligation to act judicially and he becomes subject to the controlling jurisdiction of the High Court exercised in the writs of *certiorari* and prohibition. But that circumstance would not, by itself, make such

1. (1911) 1 M.W.N. 208.

an officer a Court. The facts that the Collector who has to pass orders under section 44-B (2) is usually an officer of the revenue department and he has to act judicially in determining the questions arising for decision under that section would not make him a Revenue Court any more that the facts that, in relation to matters of marketing, or agriculture, an officer of the agricultural department is invested with power to determine questions relating to the rights of traders or ryots would constitute such officer an agricultural Court. Further, the Government do not have the right to apply to the Collector to exercise his powers under section 44-B (2) of Act (II of 1927), or section 35 (2) of Act (XIX of 1951) and cannot, in any sense of the term, be regarded as the plaintiff in proceedings under either of the sections.

In support of the proposition that the Collector, exercising his powers under section 44-B (2) of Madras Act (II of 1927) or section 35 (2) of Act (XIX of 1951) should be regarded as a Revenue Court,t he respondents' learned counsel relies on *Hurryhur Mookhopadhyaya* v. *Madub Chunder Baboo*[1] and *Maharaja Dheeraj, Raja Mahatab Chund Bahadoor* v. *The Bengal Government*[2]. Those cases related to suits for resumption of rent-free tenure, instituted under Bengal Regulation (XIX of 1793) and Regulation (II of 1819). Under those Regulations, *Lakhiraj* lands fell under three categories, lands in respect of which the grant had been made before 12th August, 1765, lands in respect of which grants had been made between that date and 1st December, 1790 and lands in regard to which the grant had been made subsequent to 1st December, 1790. The inams falling in the first category were declared to be valid and not resumable. Lands in the second category, with certain exceptions and subject to certain conditions, were declared to be invalid and as such liable to be resumed. Grants falling under the third category were declared void. In regard to lands of the second category, the Government or the landholder could institute suits for resumption according as the lands exceeded 100 *beegahs* or did not exceed 100 *beegahs*. In regard to lands of the third category which were void, the landowner was authorised to

> " dispossess the grantee by the high hand, without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable *Lakhiraj* tenures ; or to any other legal proceeding ".

Suits for resumption for which provision had been made by Regulation (XIX of 1793) and Regulation (II of 1819) had in some cases to be instituted in the civil Court and in some other cases before the Collector. But owing to confusion in the mind of litigants and their advisers, suits were instituted in Collectors' Courts even in cases in which he did not, under a proper construction of the enactment, have jurisdiction to entertain such suits. Entertainment of such suits by the Collector and decision of such suits by him " had grown into a custom " (Please see page 156 in 14 M.I.A. case). There was further a Regulation relating to limitation in Bengal, namely, Regulation (II of 1805). Sub-section (2) of section II of that Regulation was to the effect that all claims on the part of the Government, whether for the assessment of the land held exempt from public revenue or for any other public right, should be heard, tried and determined, if the same be preferred at any time within the period of 60 years from and after the origin of the cause of action. (Please see *Anand Kumar Bhattacharjee* v. *Secretary of State for India*[3]). In that state of the law, the Judicial Committee decided in *Maharajah of Burdwan's case*[2] that the right of the Government to resume a voidable *Lakhiraj* tenure comprising more than 100 *beeghas* was subject to 60 years' limitation. That was the statement of the law made in relation to suits which the Government of Bengal could institute under the laws in force in that Presidency for resumption of a tenure, which, under the relevant Regulations, was held under invalid title and was, for that reason, resumable. That statement of the law was reaffirmed in *Hurryhur Mookhopadhyaya* v. *Madub Chunder Baboo*[1]. These rulings can have no application to proceedings which a Collector

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1. (1871) 14 M.I.A. 152.
2. (1850) 4 M.I.A. 466.
3. (1916) I.L.R. 43 Cal. 973, 979.

could take *suo motu* under section 44-B (2) of Madras Act (II of 1927) or section 35 (2) of Madras Act (XIX of 1951).

We are unable to agree with the respondent's learned counsel that proceedings before the Collector under section 44-B (2) of Madras Act (II of 1927) or under section 35 (2) of Madras Act (XIX of 1951) are in the nature of a suit to which the provision of Articles 130 and 149 and section 28 of the Limitation Act can be applied.

We hold that assuming that the Government's right to resume a land granted in inam for the purpose of service connected with a temple and to regrant the land to the temple for the performance of the service, can be extinguished by adverse possession on the part of a person unconnected with the temple or the service, such adverse possession should have lasted for at least 60 years before the commencement of section 44-B of Madras Act (II of 1927).

In the case before us, on the evidence adduced before the District Collector, adverse possession commenced in 1892, that is 42 years before the commencement of the Amending Act of 1934 and was therefore ineffective even on the assumption made above, to extinguish the Government's right of resumption. Since even on that assumption the 4th respondent had not acquired title secure against proceedings under section 35 (2) of Madras Act (XIX of 1951), the order of the Collector was right and the order of the District Collector is liable to be quashed for errors of law apparent on the face of the record.

The District Collector gives no reasons why he set aside the order of the Collector in regard to land which was in the possession of the 5th respondent and as to which she had no objection to resumption. According to the partition deed, dated 10th March, 1892, which is accepted by the Collector as evidence of possession, her branch of the family was in possession of the southern 6 acres of S. No. 50, 10-41 acres in extent.

Subsequent to the enactment of section 44-B (2) of Madras Act (II of 1927), inams granted for the performance of pooja in a temple may be resumed only in accordance with the provisions of that section, and, after its repeal, in accordance with the provisions of section 35 (2) of Madras Act (XIX of 1951). The question whether the Collector would have no power to pass an order of resumption under the provisions of that section if the person who would be dispossessed in execution of the order had been in adverse possession against the inamdar for over 60 years prior to the enactment of section 44-B (2) of Act (II of 1927), we leave undecided.

The order passed by the District Collector on 14th February, 1957, in R. Dis. No. 30402 of 1956 is hereby quashed. No costs.

V.S. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Syed Ahmed Mohideen Razvi .. *Appellant**

v.

Thakirunnissa Begum .. *Respondent.*

Inams—Inam grant for performance of public services—Inalienable—Office of Kazi—Origin and functions.

It is now well established that lands granted in inam for the performance of public services is inalienable. The general principle is that it is quite opposed to the nature of the interest and duty of the public servant that he should part with it leaving himself without the means of subsistence and without further interest in the place or in the performance of the services.

The inam grant in the present case is described to have been granted for performing the duties of Kazi in the Baramahal division. When the office of Kazi of Baramahal division as such ceased to exist, it was open to the Government to resume the inam and re-grant it in whole or in part to the

* L.P.A. No. 76 of 1957. 8th August, 1958.
(17th Sravana 1880—Saka).

Kazi appointed for Tirupattur or Uttankarai taluks which are some of the taluks comprising the Baramahal division. This was never done by the Government with the result that the lands granted in inam continued to be in the possession of the members of the original grantee's family, and they were being treated as part of the family property. The lands became disannexed from any public office from the time the Baramahal division ceased to exist as such and split up into several taluks. (The parties are thus bound by their partition arrangement.)

Origin of the office of Kazi and his functions and legislative developments relating to it explained.

Appeal under Clause 15 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Ramaswami Gounder, dated 24th January, 1957 and passed in Appeal No. 619 of 1952 (preferred against the decree of the Court of the Subordinate Judge of Salem, passed in Original Suit No. 12 of 1948).

D. Ramaswami Ayyangar, for Appellant.

R. Gopalaswami Ayyangar, *T. T. Srinivasan* and *A. N. Rangaswami*, for Respondent

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Ramaswami Gounder, J., in A.S. No. 619 of 1952. It arises out of a suit filed by the respondent against the appellant for recovery of possession of the suit properties together with mesne profits. The plaintiff is the widow of one Syed Jaffar Mohideen, the brother of the defendant. It is common ground that the suit property formed part of an inam in Jagir Gurivinayanapalli which was attached to the office of the Kazi of Baramahal. Though the original grant is not available, sufficient information is to be found in the certified extract from the Inam Register (Exhibit A-37—Exhibit B-1). The entries in the Inam Register show that the inam comprised about 765 acres and was granted " for performing the duties of Kazi in the Baramahal division". It was confirmed tax-free for the service of the Kazi of Baramahal. In 1810 one Syed Abdul Razack appears to have been appointed as the Kazi of Baramahal and all inams and other emoluments of the said Kazi office were directed to be put in his possession under an order of Government. Abdul Razack had three sons of whom the eldest, Syed Jaffar Mohideen, was appointed Kazi after the death of Syed Abdul Razack. Jaffar Mohideen continued in that office till he died in 1893, and after his death his eldest son Abdul Razack was appointed Kazi (Exhibit B-2) ; but it must be noticed that he was not appointed Kazi of Baramahal division but as Kazi for the area comprising Tirupattur taluk (excluding Vaniyambadi and the neighbourhood) and Uttankarai division of the Uttankarai taluk in the Salem District. This Abdul Razack the Second died in 1933 leaving behind him his brother Fazlullah who had three sons, Jaffar Mohideen, Mohideen Hussain and the present defendant, and a daughter by name Unnissa Bi. The plaintiff is the widow of this Jaffar Mohideen. Mohideen Hussain died in 1943. After the death of Abdul Razack the Second in 1933, the defendant was appointed by the Government as Kazi (Exhibit B-7) again not for Baramahal but for the Tiruppattur taluk excluding Vaniyambadi and neighbourhood in the North Arcot District and Uttankarai sub-taluk of the Harur taluk of the Salem district. The defendant asserting his exclusive title to the entire inam filed a petition before the Collector praying that the inam may be registered in his name ; but his petition was dismissed and he was directed to establish his right in a civil Court. The defendant thereupon filed a suit against his two brothers and sister, O.S. No. 21 of 1937 in the Court of the Subordinate Judge of Salem, praying for a declaration that he was entitled to the entire property comprised in the inam and for possession of the same. The suit was not disposed of after contest but was concluded by an arrangement between the parties, the terms of which were that the properties were treated as the ancestral family properties and were divided into four shares, each of the three brothers and the sister keeping a fourth share. This arrangement was embodied in a deed of partition, dated 23rd February, 1940 (Exhibit A-1). In view of this arrangement the suit which had been filed by the defendant was agreed to be withdrawn and it was accordingly not pressed and dismissed on 21st March, 1940. The suit properties were those that fell to the share of Jaffar Mohideen, the plaintiff's husband at this partition. Jaffar Mohideen first executed a lease and then a conveyance in favour of his wife,

the plaintiff (Exhibits A-2 and A-3). Though the defendant was a party to the partition arrangement he began to interfere with the possession of the suit properties by the plaintiff's lessees and so the plaintiff filed the suit for a declaration that she was entitled to the suit properties and for recovery of possession from the defendant. The main plea in defence with which we are now concerned in this appeal was that the suit properties formed the Kazi service inam and when the defendant was appointed Kazi on 24th July, 1934, by the Government he became entitled to be in possession of all the suit properties and other properties forming kazi service inam, and being a service inam it is only the holder of the office who was entitled to it. The defendant further pleaded that the partition deed did not represent a *bona fide* transaction but was entered into for ulterior purposes. Apart from these pleas, there is a further legal plea that the service inam was not alienable as the lands were an appanage of the office, and therefore a partition or alienation of the properties is void and inoperative in law as opposed to public policy. The learned Subordinate Judge who tried the suit held that the suit lands which admittedly formed part of the Kazi service inam intended for the Kazi of Baramahal was inalienable and impartible, and though the partition entered into in 1940 between the members of the family was true, it was not valid and binding on the defendant, and likewise the lease and the conveyance to the plaintiff by her husband were not valid and binding on the defendant. On the said findings the plaintiff's suit was dismissed. The plaintiff filed an appeal to this Court, A.S. No. 619 of 1952 from the decree and judgment of the learned Subordinate Judge of Salem. The appeal to this Court eventually came on for hearing before Ramaswami Gounder, J. He thought that the appeal could not be satisfactorily disposed of without a finding on the question "whether under the order, Exhibit B-7, the defendant was appointed to the office of Kazi for the Baramahal division". The learned Subordinate Judge of Salem was directed to submit his finding on the question after permitting the parties to let in any further evidence if they chose to. The plaintiff did not let in any further evidence; but the defendant besides examining himself examined two other witnesses D.Ws. 7 and 8. The learned Subordinate Judge submitted the following finding :

> "My finding is therefore that the defendant was appointed to the office of Kazi only for the areas described, *viz.*, the division comprisng Tiruppattur taluk excluding Vaniyambadi and the neighbourhood in the North Arcot district and Uttankarai, the sub-taluk of Harur taluk, in Salem district, and not for the Baramahal divisions as such a division does not exist and does not also seem to get recognised by the Government as attached to any particular area of division at the present day."

The learned Judge, Ramaswami Gounder, J., held that after 1893 no member of the family including the defendant had been appointed as Kazi of Baramahal division and therefore it could not be held that the junior Abdul Razack and defendant had possession of the suit properties as Kazi of Tiruppattur. Nevertheless the properties continued to remain in the family. The members of the family including the plaintiff were bound by the partition arrangement of 1940. If that be so, then undoubtedly the plaintiff as the widow of Jaffar Mohideen will be entitled to the properties which fell to his share. In the result the learned Judge allowed the appeal and passed a decree in favour of the plaintiff as prayed for. Hence this appeal by the defendant.

The contention of Mr. D. Ramaswami Ayyangar, learned counsel for the appellant, was that the lands in suit formed part of a Kazi service inam and as the service of a kazi is in the nature of public service an inam granted for such purpose is impartible and inalienable, as the inam forms an appanage of the office. It is now well established that lands attached to a hereditary village office is inalienable. Section 5 of the Madras Hereditary Village Service Act embodies this rule. On principle the same restriction would apply to lands granted for public services, not covered by that Act. In *Lakshmadu* v. *Ramudu*[1], it was held that lands granted by way of dasabandam inam were inalienable, as an alienation of such an inam was against public policy and void. The decision of the Full Bench in *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[2], which dealt with lands burdened with *swastivahakam*

1. I.L.R. (1940) Mad. 123.
2. (1922) 42 M.L.J. 477 : I.L.R. 45 Mad. 620.

service has been held to cover all service inams of a public nature (vide *Ramakrishnamma* v. *Venkatasubbiah*[1]. The general principle is that it is quite opposed to the nature of the interest and duty of the public servant that he should part with it, leaving himself without the means of subsistence and without further interest in the place or in the performance of the services. The decisions relied on by Mr. Gopalaswamy Ayyangar in *Venkatarama Ayyar* v. *Chandrasekara Ayyar*[2] and *Vaidyanatha Ayyar* v. *Yogambal Ammal*[3] deal with inams in the nature of personal maintenance grants and are not opposed to the principle laid down in the catena of cases referred to above.

The only question for consideration is whether on the date on which the first defendant and the plaintiff's husband and other members of the family entered into the partition, the terms of which we find embodied in the document Exhibit A-1, dated 23rd February, 1940, the lands can be said to suffer under this disabling rule. Before dealing with the documentary evidence bearing on this question it is useful to set out briefly the history of the office of the Kazi. The office of Kazi has its origin in Muslim law and Mogul polity. The Kazi was chiefly a judicial officer corresponding to a magistrate of the present day. Besides judicial functions he also performed certain other duties, partly of a secular and partly of a religious nature, as for example, attesting and registering deeds of transfer of property and celebrating marriages and performing other rites and ceremonies. Under the British Rule there was no place for the Kazi as a judicial officer. In 1864 an Act was passed to repeal the laws relating to the office of Hindu and Mahomedan Law Officers and offices of Cazee-ool-cazaat and to abolish these offices. The Preamble runs as follows :—

"Whereas it is unnecessary to continue the offices of Hindoo and Mohammedan Law Officers and it is inexpedient that the appointment of Cazee-ool-cazaat or of city, town or pergunnah Cazees should be made by Government."

The Regulations or parts of them set forth in the Schedule annexed to the Act were repealed. There was one saving provision in section 2 of the Act in the following terms :—

"Nothing contained in this Act shall be construed so as to prevent a Cazee-ool-cazaat or any other Cazee from performing when required to do so any duties or ceremonies prescribed by the Mohammedan Law."

The Muslim community appears to have suffered inconvenience on account of the State divesting itself of the power of appointing Kazis. This led to the passing of the Kazis Act (XII of 1880). The Preamble sets out the reason for the passing of the Act :

"Whereas by the Preamble to Act (XI of 1864) (An Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and to the offices of Kazi-ul-Kuzarat and of Kazi, and to abolish the former offices) it was (among other things) declared that it was inexpedient that the appointment of the Kazi-ul-kuzarat, or of City, Town or Parganna Kazis, should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed ; and whereas by the usage of the Muhammadan community in some parts of British India the presence of Kazis appointed by the Government is required at the celebration of marriages and the performances of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of Kazi ".

The only provision of this Act to which we need refer is section 2, the material part of which runs thus :—

"Whenever it appears to the Provincial Government that any considerable number of Muhammadans resident in any local area desire that one or more Kazis should be appointed for such local area, the Provincial Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area select one or more fit persons and appoint him or them to be Kazis for such local area."

It was apparently not the intention of the Legislature to confer exclusive rights on the persons appointed as Kazis by the Government to perform the functions which

1. (1934) 68 M.L.J. 46 : I.L.R. 58 Mad. 389 at 390 and 391.
2. (1921) 40 M.L.J. 344 : I.L.R. 44 Mad. 632.
3. (1926) 51 M.L.J. 695 : I.L.R. 50 Mad. 441.

his office requires him to discharge. That is why it was enacted in section 4 that nothing contained in the Act and no appointment made under it shall be deemed " to prevent any person discharging any of the functions of a Kazi ". It is under the provisions of this Act of 1880 that the Government purported to appoint Abdul Razack Sahib as Kazi in 1893 (Exhibit B-2) and the first defendant himself was appointed in 1934 (Exhibit B-7).

The earliest document we have relating to the nature of the inam is the Inam Register of which an extract was filed in the case (Exhibit A-37/Exhibit B-1). The inam is described to have been granted for performing the duties of Kazi in the Baramahal division. Among the written instruments produced before the Inam Deputy Collector were a certificate of the Court, dated 10th August, 1810, appointing Syed Abdul Razack as the Kazi of Baramahal, an authenticated copy of a Collector's order, dated 1st October, 1813, directing all inams, villages and other emoluments of this Kazi office to be put in possession of Syed Abdul Razack Ahamad Khazi under order of Government, and a certificate dated 16th September, 1856, of a Judge appointing under orders of the Sadar Court Syed Jaffar Mohideen Sahib as the Kazi. The inam was confirmed tax free "for the service of the Khazi for Baramahal".

It now becomes necessary to determine what area was comprised in the Baramahal division. In Maclean's Manual of Administration, Vol. III, it is described as

> " A tract of country supposed to have included the modern talooks of Dharmapoory, Krishnagiri, Tripatore, Oothancarari in Salem District and the Cungoondy zamindary of North Arcot."

The history of this tract is briefly given thus ;

> " Originally governed by the Anagoondy family. Passed in 1668 under the Mysore rule, then under the Nawabs of Cuddappah, who were ousted by Hyder Ali in 1759. Ceded to the English by Tippoo in 1792 when the name was soon after abandoned."

In the glossary found at the end of the second volume of the Manual of the Salem District, the meaning of Baramahal is given thus :

> " Baramahal, the twelve palaces, signifies ' the tract ruled from the 12 palaces' and is now synonymous with the taluks of Tirupatur, Krishnagiri, Dharmapuri and Uttankarai ".

A very interesting account regarding the origin and history of the Baramahal division is found in Chapter III of the Manual, pages 82, *et seq.* The following extract from the Note on page 83 of the Manual is material :

> " The question, "what is the Baramahal ?" is one more easily asked than answered. At present it is supposed to be coterminuous with the four taluks above mentioned. At the commencement of the century it included Kangundi......"

It is important to note that the year of the publication of the Salem District Manual is 1882. In the Imperial Gazetteer of India relating to Madras Presidency (1908) (Edn.) the following information about Baramahal is to be found :

> " *Baramahal*—A name loosely applied in English histories to the north-eastern corner of Salem District, Madras, but no longer in use. It apparently included the taluks of Tirupattur, Krishnagiri, Dharmapuri and Uttangarai in Salem, and the Kangundi zamindari in North Arcot."

It is fairly clear from the evidence on record that the Baramahal division as such passed out of use. That is why evidently both in 1893 and in 1934 the appointments of Kazis were for a local area comprising Tirupattur taluk excluding Vaniyambadi and the neighbourhood in the North Arcot district and Uttankarai sub-taluk of the Harur taluk of the Salem District. The defendant admitted in his evidence given after the order of this Court calling for a finding that for Hosur taluk there is a Kazi in the town, that similarly there is a Kazi for Harur taluk, a Kazi for the Dharmapuri taluk and a Kazi for Krishnagiri taluk. There is no order of the Government vesting the inam lands which pertained to the office of the Kazi of Baramahal in the Kazi appointed for the Tirupattur and Uttankarai taluks. The position appears to be this. When the office of the Kazi of Baramahal division as such ceased to exist, it was open to the Government to resume the inam and re-grant it in whole or in part to the Kazi appointed for Tirupattur and Uttankarai taluks. This was never done by

the Government. The lands, however, continued to be in possession of the family of the plaintiff and the defendant and they were being treated as part of family property. Even as early as 1876 the inam was registered in the name of Jaffar Mohideen as well as his two brothers by consent of all parties, what rights the Government can have even now to resume the inam it is not necessary for us to consider in this case. In our opinion, the lands became disannexed from any public office from the time the Baramahal division ceased to exist as such and became split up into several taluks. It follows, therefore, that when the members of the family began to effect a partition of these lands they were not only treated as family property, but also in law were not property attached to a public service. The plea of the defendant that the lands were impartible and inalienable must therefore fail. We agree with the conclusion of the learned Judge, Ramaswami Gounder, J., that the members of the family including the defendant are bound by the partition arrangement of 1940 and the plaintiff is entitled to succeed as the heir of Jaffar Mohideen. The appeal is dismissed. No costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Regional Director, Employees' State Insurance Corporation, Madras .. *Appellant**

v.

S.M. Sriramulu Naidu .. *Respondent.*

Employees' State Insurance Act (XXXIV of 1948), section 2 (12)—Factory—What is—Cinema studio—If factory—Tests.

Interpretation of Statutes—Definition of "factory" in Employees' State Insurance Act—If could be interpreted in the light of the definition in the Factories Act.

A factory within the meaning of section 2 (12) of the Employees' State Insurance Act is any physical area in any part of which a munufacturing process is carried on. Where within the same premises or compound a number of departments are situate and the departments are engaged in the work in connection with or incidental to a manufacturing process of the factory, they would *prima facie* all form part of the factory.

The general rule of interpretation of Statutes is that the meaning and scope of the words occurring in one statute or judicial decision thereon cannot be used for the interpretation of another statute enacted with a different object or for a different purpose. This rule, however, may not apply where the statutes are *pari materia* that is to say related in such a way as to form a system of code or legislation. The Factories Act and the Employees' State Insurance Act are not so related to each other though both of them are intended to benefit the wage-earners. The Factories Act is intended to regulate the labour and working conditions of the factory employees as such mainly from the standpoint of the health and safety of the workers. Having regard to this object of the legislation it is reasonable to hold that distinct portions of a factory which are purely clerical establishments, the employees wherein would not be exposed to the dangers and risks of a factory worker would be outside the purview of the legislation.

The object and scope of the Employees' State Insurance Act is wider and more comprehensive. It is a piece of social security legislation which covers a larger class of employees than legislations such as Factories Act or Workmen's Compensation Act. The term 'Employee' in the Act includes within its scope every clerical labourer and part-time workers and apprentices. Hence the term 'factory' in the Act should have a wider interpretation than that in the Factories Act.

The scope of the term 'Factory' in the Act and the application of the Act cannot be decided on the basis of what the employer does, either for the sake of efficiency or convenience, by dividing a factory into various departments. Provided the statutory requirements of the number of persons employed and the carrying on of a manufacturing process with the aid of power in any part of a premises are satisfied, any premises, *viz.*, a geographical area within a defined boundary, would come within the scope of the Act. It is not necessary that all the twenty persons (the statutory minimum) should be working in the same section or department nor need a premises be a single building to satisfy the definition of a factory under the Act.

* L.P.A. No. 128 of 1958. 13th October, 1959. (21st Asvina, 1881—Saka.)

Appeal under clause 15 of Letters Patent against the Order and Judgment of the Hon'ble Mr. Justice Basheer Ahmed Sayeed, dated 25th April, 1958 and passed in A.A.O. No. 269 of 1957, preferred to the High Court against the Order of the Court of the Employees' Insurance, Coimbatore, dated 25th March, 1957, in proceedings No. 1 of 1956.

The Government Pleader (*K. Veeraswami*), for Appellant.

V. C. Gopalaratnam and *L. V. Krishnaswami*, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal raises a question as to the sustainability of a demand for contribution from an employer under the Employees' State Insurance Act (Act XXXIV of 1948) which, for the sake of brevity, will be referred to hereafter as the Act. The respondent was the proprietor of Pakshiraja Studios in Coimbatore. The studio was engaged in the production of cinematograph films. A number of buildings constituted this "Studios" all of them being situate in the same compound. The work in the studio was done in the following departments :—

(1) Electrical, (2) Camera, (3) Sound, (4) Setting, (5) Moulding, (6) Carpentry (7) Laboratory, (8) Editing, (9) Office and Watch and Ward, (10) Art and (11) Make-up. Electric power was utilised in connection with some of these items of the work in the studio. If all the departments were taken into account, the number of persons employed would admittedly exceed 20. But the same could not be said, if each of the departments was taken by itself. The Carpentry department, which employed more than 10 but less than 20 persons, was notified as a factory under the Factories Act. As the other departments employed less than 10 persons, none of them was brought within the purview of the Factories Act.

The workers of the studio wer paid off on 28th September, 1955 and the Studio itself was closed from 25th September, 1956. The Employees' State Insurance Act was extended to Coimbatore in the year, 1953. The appellant, claiming that the Pakshiraja Studios was a factory within the meaning of the Act, called upon the respondent to pay the employer's contribution under section 40 of the Act for the period from 23rd June, 1955, to 22nd June, 1956 and special contribution for four quarters, ending with 31st March, 1956. The latter repudiated the claim. Thereupon proceedings were initiated under section 77 of the Act, by the appellant in the Employees' Insurance Court, Coimbatore, for a declaration that the Pakshiraja Studios, Coimbatore, comprising the departments mentioned above, was a factory within the meaning of the Act, and that the respondent was liable to pay the employer's contribution and special contribution in respect of all the employees employed in the various departments, and for other reliefs. The respondent contested the claim, pleading that he was under no liability to contribute, as no one of the departments would come within the scope of the term, 'factory' under the Act. The learned District Judge of Coimbatore, who presided over the Employees' State Insurance Court, held that the Pakshiraja Studios was a 'factory' within the meaning of the Act, and that the respondent was liable to pay the contribution demanded. Aggrieved by that decision, the respondent filed an appeal to this Court, C.M.A. No. 269 of 1957. The appeal was disposed of by Basheer Ahmed Sayeed, J., who held that a factory within the meaning of the Act should connote the same idea as that coming under the Factories Act. Relying on the principle of the decision in In re. *K. V. V. Sarma*[1], the learned Judge held that each of the various departments should be held to be distinct; and that, as in the present case the various departments were located in different buildings, though within the same compound, they were capable of being treated as separate, and that, as in each department the employees numbered less than 20, not one of them could be held to be a factory within the meaning of the Act. The basis for the learned Judge's opinion was that the word 'factory' under the Act bore a definition substantially as the one under the Factories Act. In that view, the learned Judge set aside the order of the Employees' Insurance Court. In this appeal, which is filed

1. (1952) 2 M.L.J. 917 : I.L.R. (1953) Mad. 775.

against the judgment of the learned Judge, the principal question for determination is, whether Pakshiraja Studios would be a factory within the meaning of the term 'factory', in the Employees' State Insurance Act.

Section 2 (12) of the Act defines :—

" Factory means any premises, including the precincts thereof, whereon twenty or more persons are working or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on under the aid of power or is ordinarily so carried on ".

A factory thus is a physical area in any part of which a manufacturing process is carried on. Neither the term 'premises', nor the term 'precincts' has been defined in the enactment. The meaning of the term 'premises', as given in Shorter Oxford Dictionary, is a " house or building with its grounds or other appurtenances ". In Stroud's Judicial Dictionary, the term is interpreted as

" Some definite place within metes and bounds, for example, land or land with buildings upon it."

According to the Shorter Oxford Dictionary, the term, 'precincts' means

" the space enclosed by the walls or other boundaries of a particular place or building or by an imaginary line drawn around."

In Halsbury's Laws of England, 3rd Edition, Vol. 17, at page 15, an area of the factory is stated to be :—

" A factory must occupy a fixed site but a place is not excluded from the definition of factory only by reason of the fact that it is in the open air. Subject to the exceptions mentioned hereafter, the area of the factory is the whole space contained within its walls ".

In *Luttman* v. *Imperial Chemical Industries Ltd.*[1] a question arose whether a canteen, which was intended to serve the persons employed in the factory, stood within the factory, and would come withing the definition of the term, 'factory' under the Factories Act, 1937, in England. Relying upon the definition of the term in section 151 (6) of that Act, it was held that the canteen was part of the factory, as it was used for feeding and entertaining people woking in the factory, which was a purpose incidental to the process of manufacture carried on in the factory. The learned Government Pleader relied on the decision in *Hoyle* v. *Oram*[2]. In that case the appellants carried on the business of calico-printers at two places separated from each other seven miles. It was held that the same business was carried on in the two places. The case, however, turned upon the consideration of the question, whether both the premises were part of the single establishment. No question arose in the case whether the two places situate 7 miles apart would form part of the single factory.

In *Ramanathan* v. *King Emperor*[3], certain children were working in a drying yard, which was situated about five or six yards from the wall of a building in which a groundnut decorticating machine was installed. Prosecution was launched against the owner of the factory for employing the children. A question arose whether the drying yard was included in the 'factory'. Jackson, J., held that a factory, as defined by the Factories Act, would include everything, machine rooms, shed, godowns and yards, and that, if within these premises or precincts mechanical power was used in aid of any process for altering for transport or sale of any article, then these premises or precincts were a factory, and in that view, the drying factory yard, which was used for drying groundnuts, would form part of the factory, although there was no connection with the machinery of any work incidental to the manufacturing process. In *Ganpat Duttu Raskar* v. *Emperor*[4], there was a factory, manufacturing jaggery. There was an engine in a separate room and the crushing machines were outside that room. The shed, where the juice was stored in pans for boiling, was adjoining. All the buildings were in the same compound. More than 20 persons were employed in the shed, where the pans were, and the number working in the rooms were less. A question arose whether the entire building constituted a factory. That was answered in the affirmative. Thus neither under the terms of the definition under the Act nor under the principle of the cases stated above it is necessary that twenty or

1. (1955) 3 A.E.L.R. 481.
2. 142 E.R. 1090.
3. (1927) I.L.R. 50 Mad. 834 : 52 M.L.J. 207.
4. A.I.R. 1930 Bom. 162.

more should be employed in the manufacturing process itself. It is also not necessary that the entire premises should be occupied by the manufacturing process.

The definition of the term, 'Employee' in section 2 (9) supports this view. Section 2 (9) says :—

" 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere ; or

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment ; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service but does not include—

(*a*) any member of the Indian naval, military or air force ; or

(*b*) any person employed on a remuneration which in the aggregate exceeds four hundred rupees a month ;"

Where, therefore, within the same premises or compound, a number of departments are situate and the departments are engaged in the work in connection with or incidental to, the manufacturing process of the factory, they would *prima facie* all form part of the factory.

In In re *K. V. V. Sarma*[1], a similiar question arose under the Factories Act. The manager of the Gemini Studios, Madras, was prosecuted for an offence under section 2 of the Factories Act. The Gemini Studios comprised several departments, all of them being situated in the same compound ; it was conceded that three of the departments, carpentry, moulding and tinkering, would come within the Factories Act, but the dispute was raised with respect to the others. There was also a dispute whether the conversion of raw films into a finished cinematograph film could be said to be a manufacturing process. The learned Judges held on the latter question that the conversion of raw films into finished ones would amount to a manufacturing process. But, on the former question, they held that the various departments of the studios should be held to be distinct ones, and that, unless each of them was taken to constitute by itself a factory, the prosecution could not be sustained. Govinda Menon, J., (as he then was), delivering the judgment of the Bench, observed :—

" The further question has to be considered whether if any of these departments is a factory as being situated within the precincts of the Gemini Studios, then it is legally possible to separate those departments from the others which cannot be styled as factories. The building where, carpenters, moulders and tinkers are carrying on their work, is admittedly a factory and the rules and regulations of the Factories Act apply to the departments. Evidence is lacking as to whether the other departments can be so separated. It is permissible to separate the carpentry, moulding and tinkering departments which are really unnecessary for the production of the films from others. There is no evidence to show that the other departments are so intertwined as to be composite one without being capable of being separated."

The observations cited above would show that the case was decided by reason of the absence of evidence in that case to show that the various departments were integrally connected with those in which the manufacturing process was done. The decision was rendered under the Factories Act, and it has to be considered whether it can be resorted to for guidance in interpreting the provisions of the Employees' State Insurance Act.

The general rule is that in the matter of the interpretation, the meaning and scope of the words occurring in one statute or judicial decisions thereon, cannot be used for the interpretation of another statute enacted with a different object or for a different purpose. In *Inland Revenue Commissioners* v. *Forrest*[2], Lord Macnaghten observed :—

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1. (1952) 2 M.L.J. 917 : I.L.R. (1953) Mad. 775.

2. (1890) L.R. 15 A.C. 334 at 353.

"The two Acts differ widely in their scope : and even when they happen to deal with the same subject the wording is not the same. It was argued indeed that the language was 'practically identical', but that expression to my mind involves an admission that the language is different."

It is no doubt a recognised rule of interpretation, that where statutes are *pari materia*, that is to say, are so far related as to form a system or code of legislation, the rule laid down in *Palmer's case* would apply, that such Acts, 'are to be taken together as forming one system and as interpreting and enforcing each other' (Craies on Statute Law, 5th Edition, page 125). It cannot, however, be said that the Factories Act and the Employees' State Insurance Act are in *pari materia*, though they were enacted in the same year and both of them were intended to benefit the wage-earners.

The Factories Act was intended to regulate the labour and working conditions of the factory employees as such. Owing to the nature of the work in the factories, certain restrictions are placed in regard to the manner, method and conduct of the work. The Factories Act, therefore, regulated the working conditions in the factories, having regard to the health and safety of the workers, by prescribing working hours for adults, prohibiting employment of children below a particular age, and giving advantages to workers by way of leave with wages and other benefits. In section 2 (*m*) of the Factories Act the term, 'factory' is defined thus :—

"'Factory' means any premises including the precincts thereof (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on...."

The term 'Worker', has been defined in section 2 (*l*):—

"'Worker' means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with the manufacturing process, or the subject of the manufacturing process".

As the definition of the term worker and the other provisions of the enactment would show the Factories Act was essentially concerned with the regulation of the factory in the interests and for the safety of the worker, a person employed in the manufacturing process or in any work incidental thereto. It stands to reason that distinct portions therefrom, *e.g.*, a purely clerical establishment, cannot properly be within the purview of the legislation. Those persons would not be exposed to the dangers and risks to which a worker in the factory would be. In our opinion, the decision in In re *K. V. V. Sarma*[1], only recognises this principle and excludes portions of the premises which, but for the accident of being situate in the same compound, could not be regarded as a factory. But that principle cannot be extended to the case of a factory, as defined under the Employees' State Insurance Act, whose object is more comprehensive, and whose scope designedly wider.

The Employees' State Insurance Act is the outcome of a policy to provide a remedy for the widespread evils arising from the consequences of national poverty. It is a piece of social security legislation, conceived as a means of extinction of the evils of society named by Lord Beveridge (in his report which inspired this type of legislation in all countries), namely, want, disease, dirt, ignorance and indigence. Having regard to the magnitude of the task, the Act was made in the first instance applicable to factories, as defined therein. It primarily provides benefits to the employees in such factories. The Act envisages also the extension of benefits to other establishments, industrial, commercial, agricultural or otherwise by a notification by the appropriate Government. It provides for benefits to the employees in the event of sickness, maternity, injuries in the course of employment and payments to dependents in certain cases. The monetary and other benefits granted under the Act to an insured employee of a factory are secured by a system of compulsory insurance under which the employer, employees and the Government each contribute financially. This is unlike the previous legislation in respect of workers in factories. The Workmen's Compensation Act, the Factories

1. (1952) 2 M.L.J. 917 : I.L.R. (1953) Mad. 775.

Act and the Maternity Benefits Act are based on the liability of the employer. The benefits conferred by the Employees' State Insurance Act cover a larger area of employees than what the Factory Act and allied legislations intended. Under section 46 of the Act the insured persons, or, as the case may be, their dependents are entitled to its benefits. An insured person is an employee past or present in respect of whom contributions are or were payable under the Act. Contributions are made payable by and in respect of an employee. We have already referred to the definition in the Act of the term, "employee". That will include within its scope clerical and labour workers engaged or paid through contractors and also part-time workers and paid apprentices. That is in keeping with the objects of the Act, which was to relieve poverty a feature not being confined only to the actual workers in a manufacturing plant.

One of the most firmly established rules of construction of a statute is that laid down in *Heydon's case*[1]. The rule was stated thus :—

> "That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. What was the common law before the making of the Act. What was the mischief and defect for which the common law did not provide. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*".

Understood in the light of its object, the Employees' State Insurance Act should be treated as intended to cover a wider class of employees than those contemplated by the Factories Act. The terms of the various definitions contained in the Act and the nature of the benefits secured to the insured employee thereunder also point to the fact, that the term 'factory' should have different and wider interpretation than that of the same word in the Factories Act, which, as we pointed out, was intended to safeguard against the risks attendant in a factory to workers connected at least in a way with the manufacturing process. The principle of the decision in In re *K. V. V. Sarma*[2], which was concerned with the provisions of the Factories Act, cannot, therefore be extended to ascertain the extent of application of the Employees' State Insurance Act : to do so would be to restrict the scope of the Act which might lead to defeat its very objects.

The learned advocate for the respondent referred us to the decision reported in *Metro Motion* v. *F. F. Commissioner*[3]. In that case an employer had a shop where motor cars were sold : attached thereto was a service station where repairs and servicing were done to automobiles. Almost half a mile away from those premises there was a work-shop owned by the employer, where bodies for trucks and buses were made. A question arose whether the premises would constitute a factory so as to make the employer liable under the Employees' Provident Funds Act. It was held that the main shop, in which motor cars were sold, was not part of the premises. The two premises in that case were distinct, and there was no connection between the body-building undertaken in the workshop and the sale of the cars in the main shop. It was held that both together did not constitute a factory.

In our opinion the scope of the statutory definition of the term 'Factory' and the application of the Act cannot be decided on the basis of what the employer, either for the sake of efficiency or convenience of management, does, *e.g.*, by dividing the factory into various departments. The essential requisites of a factory under the Act are (1) a premises, geographical area within a certain boundary (2) in a part of which at least manufacturing process should be carried on with the aid of power and (3) twenty or more persons should be working in the premises. It is not necessary that all the twenty persons should be working in the same section or department. So long as the efforts of all the departments are co-ordinated to achieve the main object of the factory, that is, the manufacture, the decision whether a particular place is a fac-

1. (1584) 3 C.Re. 8. 775.
2. (1952) 2 M.L.J. 917 : I.L.R. (1953) Mad. 3. (1959) 1 Lab. L.J. 56.

tory or not would depend largely on the question, whether these activities are carried on within the premises of the factory. The premises need not be a single building; a number of buildings within a single compound might constitute a factory. In the present case all the buildings in which the various departments are housed lie within the same compound. P.W. 1 stated :

> " All the buildings comprising the studio comprise a composite whole, because they are all situated within one compound wall and they are inter-connected ".

That he added

> "I am not able to say now which department building is inter-connected with which other department building "

did not make the earlier statement any the less acceptable, especially when no rea attempt was made to deny the truth of what P.W. 1 claimed when R.W. 1 (Rajagopalan) was examined on behalf the respondent. It should thus be clear that it is only as a result of the co-ordinated efforts of all the departments that the raw films could be converted into finished cine films. In such a case all the departments should be taken as a unit for the purpose of ascertaining whether the premises of the studios will be a factory under the Act. Judged by this test, the Pakshiraja Studio could be a factory, and the provisions of the Employees' State Insurance Act would apply to it and the respondent would be liable to pay the contribution and special contribution. We agree, therefore, with the view taken by the Employees' Insurance Court, and allow the appeal. There will be no order as to costs throughout.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras by Deputy Commissioner of Commercial Taxes, Coimbatore .. *Petitioner.**

v.

Asher Textiles, Ltd., Tirupur .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 12-B (4)—Revision under—Scope of the powers of the High Court —Subsequent retrospective enactment after the date of the order of the Tribunal—High Court can take note of—Civil Procedure Code (V of 1908), section 115—Revisional powers—Nature of—Part of the appellate jurisdiction only.

The Sales Tax Appellate Tribunal held on the basis of the decision in *Bengal Immunity Co.* v. *State of Bihar,* (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : 6 S.T.C. 446, that the disputed turnover should not be taken into account. Subsequently, section 2 of Central Act VII of 1956 validated such assessment with retrospective effect. On the question whether in a revision against the order of the Tribunal, the High Court could take note of the subsequent retrospective enactment and interfere with the order of the Tribunal under section 12-B of the Act:

Held : the powers of an appellate Court are co-extensive with those of the Original Court (subject to such statutory restrictions as may be imposed in regard to the exercise of such power). This principle is not the result of any statutory provision like Order 41, rule 33, of the Civil Procedure Code but inherent in the nature of the appellate jurisdiction.

The remedy by way of revision does not differ from the right of appeal, the only difference being in the mode in which the power is exercised and there is no essential difference between proceedings by way of appeal and by way of revision except in regard to condition for the exercise of the powers. It follows that a Court of revision would have all the powers of an appellate Court except that the conditions of interference would have to be in accord with the relevant statutory provision. It would be open to a revisional Court to take note of a subsequent change in the law and grant relief on the basis of such law.

In one sense the revisional jurisdiction under section 115, Civil Procedure Code, can be said to be wider than the appellate jurisdiction. Under section 115, Civil Procedure Code, the High Court can call for the records of a case *suo motu.*

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*Tax Revision Case Nos. 183 and 184 of 1956. 18th September, 1959. (27th Bhadra, 1881—Saka.)

Section 12-B (4) of the Madras General Sales Tax Act gives a wider jurisdiction than section 115, Civil Procedure Code, to the High Court. Under section 12-B (4) the High Court has got powers to determine the question of law raised in the case and reverse or affirm or amend the order against which the revision was filed or remit the same to the appellate Tribunal with its opinions on the question of law. The jurisdiction under the section should be held to be appellate and the High Court would have plenary powers of interference where there is any error of law and such error would include an error by reason of any subsequent restrospective enactment.

Petitions under section 12-B (1) (*Vide* Rule 13-C (i) (*a*) of Madras General Sales Tax Act) praying the High Court to revise the Orders of the Sales Tax Appellate Tribunal, dated 18th January, 1956, and made in Tribunal Appeal Nos. 357 and 358 of 1956.

The Government Pleader (*K. Veeraswami*), for Petitioner.

K. Rajah Ayyar for *T. V. Balakrishnan*, for Respondent.

The Order of the Court was made by

Ramachandra Iyer, J.—These Revision Petitions are filed on behalf of the State of Madras and arise out of assessments to sales tax in the years 1951-52, and 1952-53 with regard to the Asher Textiles, Tiruppur, the respondent herein. The latter is the owner of a spinning mill at Tirupur, and it was assessed by the Deputy Commercial Tax Officer to sales tax on a turnover of Rs. 22,76,160-1-0 for 1951-52 and Rs. 25,73,907-6-3 for 1952-53. The Commercial Tax Officer, proceeding to act *suo motu* under section 12 (1) of the Madras General Sales Tax Act, revised the assessable turnover in a sum of Rs. 31,94,143-10-6 and Rs. 36,42,116-10-5 respectively. The assessee preferred appeals to the Sales Tax Appellate Tribunal which reduced the respective turnovers by Rs. 2,62,205-3-3 and Rs. 3,98,343-0-5. Those sums represented the price of cotton sold and despatched by dealers outside Madras State and delivered to the assessee at Tirupur, intended to be and later utilised for consumption in the spinning mills belonging to the assessee. The Sales Tax Appellate Tribunal, relying on the decision in *Bengal Immunity Co., Ltd.* v. *The State of Bihar*[1], held that the assessment in regard to the turnover representing the price of cotton purchased outside the State of Madras would come within the ban of Article 286 (2) of the Constitution, and, therefore, it would not be liable to be taxed.

It is not disputed before us that the decision of the Tribunal was correct, having regard to the law prevailing on the date when it made the order. But the learned Government Pleader relied for the validity of the assessments on the provisions contained in Ordinance III of 1956, which was subsequently replaced by the Sales Tax Validation Act (VII of 1956). The Ordinance and the enactment were passed subsequent to the decision of the Tribunal and had the effect of validating the assessments like those concerned in the disputed transactions.

The sales in the instant case were inter-State ones, under which the goods were delivered within this State for the purpose of consumption in this State and were assessable under the provisions of the Madras General Sales Tax Act, 1939, having regard to the definition of the word, 'sale' in section 2 (*h*) read with section 22 of the Act. The question, whether a State Legislature could enact laws to tax such sales was considered in the *State of Bombay* v. *United Motors (India), Ltd.*,[2] where it was held that a sale of goods which was essentially an inter-State dealing could be validly taxed in the State, where the goods were delivered for consumption. Conformably to this view the various State Legislatures enacted laws to tax sales inter-State in character where delivery for the purpose of consumption was made within the taxing State. Section 22 of the Madras Act enabled the levy of tax on such sales. The question of the validity of such taxing provisions was again considered by the Supreme Court. In *Bengal Immunity Co.* v. *The State of Bihar*[1] where it was held that no State could impose or authorise the imposition of any tax on sales or purchases

1. (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : (1955) 2 M.L.J. (S.C.) 168 : 6 S.T.C. 446.
2. (1953) S.C.J. 373 : 1953 S.C.R. 1069 : (1953) 1 M.L.J. 743 (S.C.) : 4 S.T.C. 133.

when such sales or purchase took place in the course of inter-State trade or commerce irrespective of the fact, whether the goods were delivered for consumption or not. The *Explanation* to Article 286 (1) (*a*) of the Constitution, which was relied on in the earlier case for interpreting the scope of Article 286 (2), was held inapplicable for the purpose, and the learned Judges of the Supreme Court held by a majority that, except in so far as Parliament might by law provide otherwise, no State law could impose or authorise the imposition of any tax on sales or purchases which took place in the course of inter-State trade or commerce. The result was that all taxes on inter-State sales by the State in which delivery was intended and effected became invalid after 1st April, 1951 (till which date there was an order by the President under Article 286 (2) Proviso). The decision in the *Bengal Immunity Co.* v. *State of Bihar*[1] was rendered on 6th September, 1955. Ordinance III of 1956, which was intended to validate all levies and collections of the tax from 1st April, 1951 to 6th September, 1955, came into force on 30th January, 1956. The Ordinance was followed by Act VII of 1956, and section 2 of the enactment validated all the taxes in regard to inter-State sales during the period 1st April, 1951 to 6th September, 1955. Neither the Ordinance nor the enactment by itself imposed any tax : but they removed the ban imposed by Article 286 (2) in cases where there had been an enactment authorising a tax on such sales by the concerned State Legislature. Therefore, in order that a levy of sales tax on inter-State sales could be validated by its provisions, there must have been some legislation in the State concerned levying such a tax. Under section 22 of the Madras General Sales Tax Act read with section 2 (*h*) such sales were liable to be included in the taxable turnover. The question whether in respect of the sales of the nature specified in the *Explanation* to Article 286 (1) (*a*) of the Constitution, more compendiously referred to as "Explanation sales" (which could not be taxed by any State Legislature), there had been a levy which was validated subsequently, was considered with reference to the effect of section 2 of Ordinance III of 1956 in *Mettur Industries Ltd.* v. *The State of Madras*[2]. It was held that section 2 of the Ordinance would have the effect of removing the ban on the legislative powers of the State, and that the levy of the taxes on sales between the two dates specified thereunder would be valid. This view was accepted and affirmed in *Sundararama Ayyar* v. *State of Andhra Pradesh*[3] by the Supreme Court. It would follow that section 2 of Act VII of 1956 which replaced the Ordinance will have a similar effect. The assessment in the instant case should be held therefore to have been valid.

Mr. K. Rajah Ayyar, the learned advocate for the respondent did not dispute that the assessments which had been held by the Tribunal to be illegal by reason of the decision in the *Bengal Immunity Co.* v. *State of Bihar*[1] would be validated by the provisions of Act VII of 1956. But he contended that, inasmuch as the order of the Sales Tax Appellate Tribunal was passed on 18th January, 1956, before 30th January, 1956, when the Ordinance came into force, the order of the Appellate Tribunal should be held to be correct under the law as it existed on that date, and whatever the other remedy of the State might be, this Court, acting under section 12-B would have no jurisdiction to set aside the order, which was a proper one on the date when it was passed. It was contended that it would not be open to a Court of revision to apply the provisions of a subsequent retrospective enactment, as its powers would be limited to considering the question of the correctness of the order of the subordinate authority on its face in the light of the State of the Law existing when such authority passed the order. It was contended that the superior Court would have jurisdiction to take notice of and apply the provisions of any law passed subsequent to the order of the subordinate Court only in those cases where it would be competent to dispose of the matter afresh, that is in those cases where it had authority to re-hear the matter, and not where its jurisdiction is limited to correcting or revising errors in

1. (1955) S.C.J. 672 : (1955) 2 S.C.R. 603 : (1955) 2 M.L.J. (S.C.) 168: (1955) 6 S.T.C. 446.
2. (1956) 7 S.T.C. 691.
3. (1958) S.C.J. 459 : (1958) 1 M.L.J. (S.C.) 179 : (1958) 1 An.W.R. (S.C.) 179 : 9 S.T.C. 298

the orders of the inferior Tribunal. In support of his contention, the learned counsel relied on the decision in *Louis Dreyfus and Company Ltd.* v. *The Province of Madras*[1], where Krishnaswami Nayudu, J., held that under rule 14 (2) of Madras General Sales Tax Rules, 1931, the Commercial Tax Officer, who had a revisional jurisdiction could only examine the records to decide the legality and propriety of the proceedings and that it was not open to him to go beyond the order or the records and act upon further information or evidence placed before him so as to disturb the order originally passed and hold that it was not proper.

Before considering the correctness or otherwise of the view expressed in that decision, it will be necessary to consider the powers of a Court exercising revisional jurisdiction, with particular reference to the powers under section 12-B of the Madras General Sales Tax Act. Mr. Rajah Iyer's contention is that generally a revision petition does not involve a re-hearing of the matter, and the powers of the superior Court entertaining the revision should be confined to or analogous to the exercise of jurisdiction by the King's Bench in England over the inferior Courts by the issue of a writ known as a writ of error. In former times the King's Bench in England had jurisdiction to call for a judgment from the inferior Courts by the issue of a writ of error. The writ was issued either on the ground of a mere fact which affected the validity of the action, as for example, that the unsuccessful party was an infant or not properly represented or that there was some error in point of law apparent on the face of the proceedings, or, in other words error apparent in the face of the record. In such proceedings the superior Court had no jurisdiction to go beyond the record to set aside or alter the judgment of the inferior Court. That rule, however, has not been applied in this country in the matter of exercise of appellate jurisdiction. In *Krishnamachariar* v. *Mangammal*[2], Bashyam Ayyangar, J., observed that, when an appeal was preferred from a decree of the Court of first instance, the suit should be deemed to continue in the Court of appeal and re-heard either fully or in part. In *Kanakayya* v. *Janardhana Padhi*[3] there was a decree for ejectment by the lower Court. Pending the appeal, the Madras Estates Land Act (I of 1908) was enacted, which conferred occupancy rights on all tenants who were in possession on the date when the Act came into force. The Full Bench held that the appellant would be entitled to claim relief under the Act. Krishnaswami Ayyar, J., in the order of reference to the Full Bench, considered the powers of an appellate Court. The learned Judge observed that, if the appellate Court was a mere Court of error whose functions were limited to correcting the error committed by the original Court, a change in the law subsequent to the original Court's decision would not entitle it to interfere with the original decision. But having regard to the provisions of Order 41, rule 33, Civil Procedure Code, he held that the powers of an appellate Tribunal were not merely those of a Court of error in England, but one where it had all the powers of the original Court. A similar question arose before the Federal Court in *Lachmeshwar* v. *Keshwar Lal*[4], where that Court had to consider the effect of a statute passed pending an appeal to it. Varadachariar, J., held that an appeal being, in the nature of re-hearing, it would be open to the Court to mould the relief to be granted after taking into account even the facts and events which had come into existence after the decree appealed against. Mr. Rajah Ayyar distinguished the two cases on the ground that they related to the powers of an appellate Court which by virtue of Order 41, rule 33, Civil Procedure Code, were co-extensive with those of the original Court. In this connection, he referred to the decision in *Quilter* v. *Mapleson*[5]. It was held in that case that, though a judgment of the Subordinate Court was correct according to law as it stood on the date thereof, the Court of appeal could grant relief to the appellant according to the law as it stood at the date of hearing the appeal. The learned Judges of the Court of appeal in so deciding relied on the provisions of Order 58, rule 1 of the Rules of the Supreme Court, where it was stated that appeals would be by way of re-hearing. From this it was con-

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1. (1952) 3 S.T.C. 19.
2. (1903) I.L.R. 26 Mad. 91 (F.B.).
3. (1913) 21 M.L.J. 31 : I.L.R. 36 Mad. 439.
4. (1940) F.C.R. 84 : (1939-40) F.L.J. (F.C.) 73 : (1941) M.L.J. (Supp.) 49 : A.I.R. 1941 Mad. Fed. Cas. 5.
5. (1882) L.R. 9 Q.B.D. 672.

tended that, where there were no powers expressly conferred on the appellate Court like those in Order 58, rule 1 of the Rules of the English Procedure or Order 41, rule 33 of the Civil Procedure Code there would be no authority even in an appellate Court to do more than merely decide whether the order of the inferior Court or Tribunal was in accordance with the law which prevailed then. Relying on that argument it was further contended that a Court of revision would have no jurisdiction to take note of any subsequent enactment or change in the law to afford relief to the aggrieved party.

This contention cannot, however, be accepted. The principle that an appellate Court had authority to take note of change in the law subsequent to the original Court's decision and mould the relief in accordance therewith does not rest merely on the provisions like Order 41, rule 33, Civil Procedure Code. Such power is inherent in the very nature of the appellate jurisdiction possessed by it. The decision in *Krishnamachariar* v. *Mangammal*[1] was given when there was no provision corresponding to Order 41, rule 33 in the Civil Procedure Code of 1888. Nor was that rule applicable to the appeals before the Federal Court in *Lachmeshwar* v. *Keshwar Lal*[2]. But it was held in both those cases that the appellate Court had the jurisdiction as if the original proceedings were continued therein. In *Kanakayya* v. *Janardhana Padhi*[3], Krishnaswami Ayyar, J., observed;

"Even before the passing of the Code of Civil Procedure it was not the theory under the old Code that the appellate Court had only the limited authority to rectify any errors that might be pointed in the original decision."

The learned Judge held that there was no warrant for supposing that the appellate Courts in India were confined to the determination of the correctness of the original decision in accordance with the law as it stood at the date of that decision.

It follows that the principle that an appellate Court's powers are co-extensive with those of the original Court (subject of course to such statutory restrictions as may be imposed in regard to the exercise of such power) is not the result of any statutory provision like Order 41, rule 33, Civil Procedure Code, but inherent in the nature of appellate jurisdiction.

The question then is, what exactly is the nature of revisional jurisdiction. If revisional jurisdiction is to equate appellate jurisdiction, the Court exercising that jurisdiction would have all its powers under that jurisdiction, limited in regard to the mode or conditions of the exercise of that jurisdiction only by the statute which conferred it. If, however, it is not an appellate jurisdiction but a special one conferred by statute, the question will arise as to the extent of the powers. The contention on behalf of the respondent before us was that the revisional jurisdiction under section 12-B of the Act was a special one to which the powers of an appellate Court would not be attracted. Reliance was placed on the decision of the Nagpur High Court in *Narayana Rao* v. *R. D. Swami*[4]. That was a case under Article 226 of the Constitution. The proceedings related to a Rent Controller's order in respect of a building. Pending the proceedings under Article 226 of the Constitution, there was an amendment in the statute. A question arose whether the High Court, while seized of the matter under Article 226 was bound to apply the statute as amended, or decide the case on the basis of the law, as it stood on the date of the order of the inferior Tribunal. The learned Judges held that the proceedings under Article 226 were not in continuation of the application before the inferior Tribunal or an appeal therefrom, and that the High Court could only decide the matter according to the law in force at the time of the decision of the inferior Court. As the learned Judges in that case pointed out, proceedings under Article 226 are original in their nature and the powers of the superior Court would not be those of an appellate Court. The decision in that case however is opposed to the decision of this Court in *Satyanarayana* v. *Venkataratnamma*[5]. In that case the facts were similar.

1. (1903) I.L.R. 26 Mad. 91 (F.B.).
2. (1940) F.C.R. 84 : (1939-40) F.L.J. (F.C.) 73 : (1941) M.L.J. (Supp.) 49 : A.I.R. 1941 Fed. Cas. 5.
3. (1913) 21 M.L.J. 31 : I.L.R. 36 Mad. 439.
4. A.I.R. 1953 Nagpur 271.
5. (1951) 2 M.L.J. 477.

There was a statutory amendment of the law pending the application under Article 226 to quash the order of the inferior Tribunal. The learned Judges held that, after the issue of the rule *nisi* the decision of the inferior Tribunal was set at large, and that the provisions of the amended statute could be applied.

The question whether the power of revision exercised by the High Court was a part of the appellate Court's jurisdiction was considered in *Chappan* v. *Moidin Kutti*[1], where it was answered in the affirmative. At page 81, Subramania Ayyar, J., observed:

"'An appellate Jurisdiction' as pointed out by Story in the passage immediately following that already quoted, "may be exercised in a variety of forms and indeed in any form which the Legislature may choose to prescribe". Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by a party as a matter of right or only subject to his obtaining the leave of the Court which passed the decision to be appealed against. Again, the power to review or revise may be confined, to points of law or may extend to matters of fact also.

Clearly Legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions prescribed by section 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitation just above referred to and more commonly imposed by Legislatures on the exercise of appellate functions. But none of such limitations, however much it may circumscribe the exercise of the power, touches as already remarked, the intrinsic quality of the power itself. Now, as section 622 in question gives in terms to this Court the power to revise decisions of Courts subordinate to it, it follows that the essential criterion of appellate jurisdiction, enunciated in the above quotations, is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is therefore a part of the Court's appellate jurisdiction."

Earlier in the judgment, the learned Judge referred to a passage in section 1761 of "the Commentaries on the Constitution of the United States" by Story, which stated that the essential criterion of an appellate jurisdiction was that it revised and corrected the proceedings in a cause already instituted and did not create that cause. That question with reference to section 115, Civil Procedure Code, was again considered by a Full Bench in *Chidambara Nadar* v. *Rama Nadar*[2]. Venkatasubba Rao, J., delivering the judgment of the Full Bench, held that the remedy by way of revision did not differ from the right of appeal (the only difference being in the mode, in which the power was exercised). The learned Judge referred to the several decisions on the subject and held that there was no essential difference between proceedings by way of appeal and by way of revision, except in regard to condition for the exercise of the powers. It follows that a Court of revision would have all the powers of an appellate Court except that the conditions of interference would have to be in accord with the relevant statutory provision. Therefore, it will be open to a revisional Court to take note of a subsequent change in the law, and grant reliefs to the parties on the basis of such law. It is needless to point out that it has been an almost invariable practice of this Court to take note of subsequent events, while disposing of Civil Revision Petitions under section 115, Civil Procedure Code and grant reliefs to the parties in accordance with the altered circumstances. The nature of the jurisdiction is appellate and all the powers inherent in an appellate Court would be available to the Court of revision, subject to the limitation that it could interfere only under those conditions prescribed by the Statute. If those conditions are satisfied, its powers are as wide as those of the Court of first instance or the appellate Court. In one sense the jurisdiction under section 115, Civil Procedure Code, is wider than even the jurisdiction of an appellate Court. In a case under section 115, Civil Procedure Code, for instance, the High Court can call for records of the case *suo moto*. Although the party had not moved in the matter, the High Court could interfere with the order of the lower Court within the ambit of the provision, irrespective of the fact that the party against whom the order was passed did or did not complain against it, whereas in an appeal the powers of the Court would be circumscribed or limited to the actual matter in dispute before it, and would not extend to the matter which was not the subject-matter of the appeal.

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1. (1899) 8 M.L.J. 231 : I.L.R. 22 Mad. 68. 616 (F.B.).
2. (1937) 1 M.L.J. 453 : I.L.R. (1937) Mad.

Section 12-B (4) of the Madras General Sales Tax Act gives a wider jurisdiction than section 115, Civil Procedure Code, to this Court. Under section 12-B (4) the High Court has got powers to determine the questions of law raised in the case, and reverse or affirm or amend the order against which the revision petition was filed or remit the same to the appellate Tribunal with its opinion on the question of law. The decision in *Louis Dreyfus and Company Ltd.* v. *The Province of Madras*[1], to which reference was made already has been overruled in the *State of Madras* v. *Louis Dreyfus and Company Ltd.*[2]. But the Full Bench did not consider whether the observations contained in the former decision in regard to the powers of the appellate authority was correct or not. On the principles discussed already, the jurisdiction under that section should be held to be appellate jurisdiction; this Court would, therefore, have plenary powers of interference where there is any error of law. Such error would include an error by reason of any subsequent retrospective enactment. In *Thippanna Rayappa* v. *Government of Andhra*[3] it was held that section 12-A (4) would enable an appellate Tribunal to re-hear the case.

In *Venkatachalam* v. *Bombay Dyeing and Manufacturing Co., Ltd.*[4], a question arose under section 35 of the Indian Income Tax Act. On the date of the assessment, the assessee was entitled to interst on the advance tax paid under section 18-A. Subsequently there was an amendment of the enactment, under which the assessee would be entitled to interest not on the whole of the advance tax paid by him, but only on the difference between payment made and the amount assessed. The Amending Act provided that it was to have retrospective operation from 1st of April, 1952, which was prior to the date of the assessment. The Income Tax Officer, proceeding to act under section 35 of the Act, rectified the assessment order holding that the assessee was entitled only to the amount sanctioned by the Amending Act. Before the Supreme Court it was contended that the retrospective operation of the statute could not affect the completed assessment. At page 711, the Supreme Court observed :

> "*Prima facie* it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction we must read the subsequently inserted Proviso as forming part of section 18-A (5) of the principal Act as from 1st April, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said Proviso and must be deemed to suffer from a mistake apparent from the record."

The principle enunciated by the Supreme Court would support the view, that in the case of a retrospective enactment the law as later enacted should be deemed to have been in existence on the date of the order of the inferior Tribunal, even though it was not actually so. On that principle it would follow that the decision of the inferior Tribunal was against law and a superior Court which has seisin of the case as a Court of revision at the time when the retrospective legislation was enacted and which had the jurisdiction to interfere in cases where an error of law was committed could give effect to that law. In the instant case the effect of section 2 of Act VII of 1956 is that assessments were lawful on the date on which they were made. It follows that there was an error in the order of the Appellate Tribunal when it held that the disputed turnover should not be taken into account. Being an error of law, this Court would have jurisdiction to rectify it under section 12-B of the Madras General Sales Tax Act. The order of the Appellate Tribunal granting exemption in respect of the turnovers aforesaid is set aside, and they will be directed to be included in the assessable turnover.

The revision petitions are allowed. But there will be no order as to costs.

V.S. ——— *Revision-petitions allowed.*

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1. (1952) 3 S.T.C. 19.
2. (1956) 2 M.L.J. 327: 1 I.L.R. (1956) Mad. 1285 : 6 S.T.C. 318.
3. (1957) 1 An. W.R. 250 : 8 S.T.C. 660.
4. (1958) S.C.J. 1054: 1959 S.C.R. 703: (1958) 2 M.L.J. (S.C.) 182: (1958) 2 An.W.R. (S.C.) 182.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

T. I. Muhammad Zumoon Sahib .. *Appellant.**

v.

Fathimunnisa *alias* Bibijan and others .. *Respondents.*

Trade Marks Act (V of 1940), sections 21 and 35—Scope and effect of—Death of registered proprietor of trade-mark—Infringement of trade-mark—Suit for injunction by heirs of deceased proprietor—Maintainability—Omission to get registration in their names—If bar to suit—Effect of registration.

Section 21 of the Trade Marks Act confers on the proprietor in whose name the trade mark is registered the exclusive right to the use of the trade mark. That exclusive right is capable of assignment and transmission and, on the death of the registered proprietor, the right would devolve on his representative or representatives under the rules of personal law applicable to the parties. Such heir or heirs on whom the right has devolved would be entitled to the same right which the original registered proprietor had for the use of the registered trade mark.

Section 35 of the Act prescribes a procedure for the assignee or representative to have registration of his title. But it is not such registration by the Registrar under section 35 that confers title on the representative or the right to bring an action for infringement of the trade mark. The registration under section 35 is "on proof of title". The title already exists in the legal representative and on proof of title to his satisfaction, the Registrar registers him as the proprietor of the trade mark. There is nothing in sections 21 and 35 to warrant the contention that it is only the order of the Registrar under section 35 which confers a right on the heirs of the orginal registered proprietor to bring an action for infringement of the trade mark.

Nor does the registration give the heirs a fresh cause of action. The cause of action is the infringement of the trade mark. All that section 35 gives is a recognition of the title which already exists in the legal representatives of the deceased proprietor. The heirs of the deceased proprietor who bring an action for infringement of the trade mark cannot be non-suited on the ground that the trade mark had not been registered in their names under section 35. In any event, when registration is effected and the certificate of the Registrar is produced before judgment in the suit, there can be no further objection on the score of non-registration under section 35.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Panchapakesa Ayyar, dated 30th September, 1958 and passed in A.S. No. 109 of 1958, preferred to the High Court against the decree of the District Court of Tiruchirapalli in O.S. No. 2 of 1954.

K. V. Srinivasa Ayyar, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—There are no merits in this appeal. The suit was for an injunction to restrain the defendant from infringing a registered trade mark. Admittedly one Mahomed Yoonus Sahib was the person in whose name the said trade mark was duly registered with the Registrar of Trade Marks, Bombay, the trade mark being "703 Yoonus Beedi". Yoonus died on 8th May, 1953 and it is not denied that the plaintiffs-respondents are his heirs. After the death of Yoonus the plaintiffs continued to run his business and to manufacture and sell beedis under the said trade mark. They found that the defendant was also manufacturing and selling beedis under a similar trade mark. Hence they brought the action out of which this appeal arises. The only plea which was put forward with some force in the trial Court is that covered by the issue "Are the plaintiffs not entitled to bring this suit in the absence of registry in their name?" This plea was apparently based on two sections of the Trade Marks Act, 1940, sections 21 and 35. Section 21 *inter alia* provides that the registration of a person in the register as proprietor of a trade mark in respect of any goods shall give to that person the exclusive right to the use of the trade mark in relation to those goods. The right is deemed to be infringed by any other person using a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade. The definition of a

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*L.P. Appeal No. 48 of 1959. 21st July, 1959.
(30th Asadha, 1881—Saka.)

registered trade mark in section 2 (1) (*j*), namely " a trade mark which is actually on the register " has reference to this section. Section 35 runs as follows :—

"35 (1): Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register."

The plaintiffs had, on the date of the institution of the suit, not taken steps under section 35 of the Act and obtained from the Registrar registration of their title. At the end of the trial, however, they did obtain an order of the Registrar on 7th August, 1954, recognising the title of the plaintiffs to the trade mark. With leave of the Court the order of the Registrar, was received in evidence and at their request the defendant was given leave to file an additional written statement. Additional issues were framed, namely, whether the certificate granted by the Registrar was illegal and void, and whether the plaintiffs were entitled to rely on the certificate. The learned District Judge who tried the suit held that the suit was maintainable even without an order of the Registrar under section 35 of the Act, that in any event the plaintiffs had obtained an order under section 35 pending the suit, and that the suit was therefore sustainable. It was contended before him that the registry of the plaintiffs under section 35 gives the plaintiffs a new cause of action; but that contention was not accepted. In the result the suit was decreed. The defendant filed an appeal to this Court, A.S.No. 109 of 1955, which was heard and disposed of by Panchapakesa Ayyar, J. The learned Judge took substantially the same view as the learned District Judge on both the points. He held that even before an order was passsed under section 35, a suit for infringement of a trade mark was maintainable, and that in any event as the plaintiffs had obtained an order under section 35 before judgment was delivered in the case, the defendant could not raise any further objection. He therefore dismissed the appeal. From the judgment of the learned Judge this appeal has been filed by the defendant under the Letters Patent.

Mr. Srinivasa Ayyar vehemently contended that it is only the order of the Registrar under section 35 which confers a right on the heirs of the original registered proprietor to bring an action for infringement of the trade mark. He only relied on the provisions of sections 21 and 35 in support of his argument and was unable to cite any authority. There is nothing in section 21 or section 35 of the Act which supports this argument. Section 21 confers on the proprietor in whose name the trade mark is registered the exclusive right to the use of the trade mark. That exclusive right is capable of assignment, and on the death of the registered proprietor the right would devolve under the Rules of personal law applicable to the party. Such person or persons on whom the right has devolved would be entitled to the same right which the original registered proprietor had for the use of the registered trade mark. It is true that section 35 prescribes a procedure for the assignee of the representative to have registration of his title. The fallacy in the argument of Mr. Srinivasa Ayyar, learned counsel for the appellant, is that it is this registration by the Registrar under section 35 (1) of the Act that confers title on the representative. The registration is expressly stated in section 35 to be " on proof of title ". The title already exists in the legal representative and on proof of such title to his satisfaction, the Registrar registers him as the proprietor of the trade mark.

In any event the entire discussion is academic, because before the judgment was delivered in the case the plaintiffs filed into Court an order of the Registrar under section 35 (1) recognising their title. Mr. Srinivasa Ayyar urged that the plaint should have been amended because the registration under section 35 really gave a fresh cause of action to the plaintiffs. It is again based on a fallacy. The cause of action is the infrignment of the trade mark. The order of the Registrar under section 35 by itself does not give a cause of action. All that it gives is a recognition of the title which already inheres in the legal representatives of the deceased proprietor. As the learned District Judge points out, the logical result of the acceptance of learned counsel's argument is that during the interval which must inevitably

elapse between the date of the death of the registered proprietor and an order of the Registrar under section 35 (1), any person could with impunity infringe the trade mark. Mr. Srinivasa Ayyar said that a passing off action could be filed; but then that action is different in material particulars from an action for infringement of a registered trade mark. We see no substance in the contentions, raised on behalf of the appellant. The appeal is therefore dismissed.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE RAMACHANDRA AYYAR.

The Cauvery Spinning and Weaving Mills Ltd. .. *Petitioner**

In the matter of the Companies Act I of 1956

and

In the matter of the Cauveri Spinning and Weaving Mills, Ltd.

Companies Act (I of 1956), sections 2 (14) and 10—" District Court "—Madras City Civil Court——If " District Court "—Jurisdiction in respect of matters under section 10 (2)—Central Government Notification dated 29th May, 1959—Effect of—Madras City Civil Court Act (VII of 1892), section 3-A.

The Madras City Civil Court is not a " District Court " as defined in section 2 (14) of the Companies Act, 1956, so as to empower it to exercise jurisdiction in respect of matters enumerated in section 10. Being a Court of limited jurisdiction, the city civil Court cannot be held to be a principal civil Court of original jurisdiction. In the City of Madras the principal civil Court of original jurisdiction would be the High Court in the original side.

Hence the Madras City Civil Court cannot have any jurisdiction by virtue of the Notification of the Central Government, dated 29th May, 1959, in exercise of the powers conferred by section 10 (2) of the Companies Act; the matters covered by section 10 (2) should be dealt with only by the High Court on the original side.

Petition under section 141 of the Companies Act praying the High Court (1) to extend the time for registering the modification of the charges and the variation in the terms and conditions and the extent and operation of the charge under the debenture trust deeds, dated 25th August, 1951 and 15th Setpember, 1955, effected by the deed of release and reconveyance, dated the 29th November, 1958, by three weeks from the date of the order on this petition, and (2) to dispense with publication of notices in the *Fort St. George Gazette* and the papers.

M. V. Ganapathi, for Petitioner.

The Court made the following

ORDER.—This petition has been posted before me for directions as to its transfer to the City Civil Court, Madras. This petition is under section 141 of the Indian Companies Act, 1956, for extending the time for registration of the modification of a charge. It was presented in this Court on 2nd May, 1959. On 29th May, 1959, the Union Government in exercise of the powers conferred by sub-section (2) of section 10 of the Companies Act, 1956, empowered all the District Courts in the Union of India to exercise the jurisdiction conferred upon the High Court under the sections specified in the said Notification. Under the above Notification the District Courts of the State were empowered to exercise jurisdiction under section 141 of the Act. The Office of the Registrar seeks the direction of this Court as to whether O.P. No 120 of 1959 could be transferred to the City Civil Court, Madras, in pursuance of that Notification.

Section 10 (1) of the Act runs thus:—

" (1) The Court having jurisdiction under this Act shall be—

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*O.P. No. 120 of 1959. 24th July, 1959. (2nd Sravana, 1881—Saka).

(*a*) the High Court having jurisdiction in relation to the place at which the registered office of the Company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(*b*) where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district."

Sub-section (2) so far as it is relevant for our purpose is to the effect:

"The Central Government may, by notification in the Official Gazette and subject to such restrictions, limitations and conditions as it thinks fit, empower any District Court to exercise all or any of the jurisdiction conferred by this Act upon the Court, not being the jurisdiction conferred..."

Proceedings under section 141 would undoubtedly be one of those in respect of which the matter can be heard by the District Court, if so empowered under section 10 (2). Section 2 (14) of the Companies Act defines a District Court thus:

"'District Court' means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction."

The short question in this case is, whether the Madras City Civil Court would be a "District Court" within the meaning of section 2 (14); so as to empower it to exercise jurisdiction in respect of matters enumerated therein. It is evident from the definition of "District Court" that it should be the principal Civil Court of original jurisdiction. The Madras City Civil Court cannot be said to be the principal Civil Court of original jurisdiction. Under section 3 (*a*) of the Madras City Civil Courts Act, 1892, the jurisdiction of that Court is limited. At the present moment, that Court is empowered to try civil suits of the value of Rs. 50,000 and below. Being a Court of limited jurisdiction, it cannot be held to be the principal Civil Court of original jurisdiction. In the City of Madras the principal Civil Court of original jurisdiction would be the Original Side of the High Court. I am, therefore, of opinion that the Madras City Civil Court would have no jurisdiction by virtue of the Notification of the Central Government dated 29th May, 1959 and that the matters covered by section 10 (2) of the Act should be dealt with only by this Court.

P.R.N. ——— *Directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

Kuppammal .. *Appellant**

v.

Rangaswami Chettiar .. *Respondent.*

Guardians and Wards Act (VIII of 1890), sections 24 and 43—Duty of Court—Application by guardian for permission for marriage of minor girl—Relatives of minor desirous of alliance with proposed bridegroom—Minor over 15 years also expressing liking for the proposal—Rejection of sanction on ground that minor may obtain better offers later on—Propriety.

Where the guardian of a minor girl of over 15 years of age applies to the District Court under section 24 read with section 43 of the Guardians and Wards Act for permission for the marriage of the minor with a proposed bridegroom, it is not the function of the District Judge to constitute himself as a matrimonial agency and to consider whether that was the best offer or whether a better offer might not eventuate later. That is not the true perspective of approach to adopt in a matter of this kind.

Where the immediate relatives of the minor are united in affirming the desirability of the proposed alliance, and the minor girl herself who is over 15 years, expresses her preference to the proposed alliance, the ordinary approach should be that sanction should be accorded, unless the Court is able to discover some substantial objection against the alliance.

Appeal against the Order of the District Court of South Arcot at Cuddalore, dated 11th July, 1959 and made in M.P. No. 289 of 1959 in O.P. No. 114 of 1949.

T. M. Krishnaswami Ayyar and *A. Balasubramaniam*, for Appellant.

K. S. Desikan and *K. Raman*, for Respondent.

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* A.A.O. No. 170 of 1959. 5th September, 1959.
(14th Bhadra, 1881—Saka.)

The Court delivered the following

JUDGMENT.—This proceeding in appeal arises out of an application in the lower Court by the personal and property guardian of a minor, seeking the permission of the Court under section 24 read with section 43 of the Guardians and Wards Act, for the marriage of the minor with the proposed bridegroom. The learned District Judge went into the matter on the merits, and in paragraph 9 of his order, he comes to the conclusion that the minor, who seems to possess considerable properties, might well be in a position later to obtain better offers. Upon this ground, the sanction prayed for was not accorded, and the petition was dismissed. It is important to add here that certain other matters were canvassed in the proceedings of the lower Court, and certain possible objections examined. These included the fact that the proposed bridegroom was not as wealthy as the bride ; that his properties were subject to a mortgage, and that the mother of the bridegroom was supposed to be suffering from some complaint which might render the alliance undesirable. The learned District Judge went into all this, and found that not a single one of these objections could really be sustained. Obviously, he would have accorded the permission without hesitation, but for the ground that I have referred to earlier, that is, that considering the age, community, and economic status of the bride, he thought that she might very well obtain better offers in course of time.

Needless to say, this is not at all the true perspective of approach which should have been adopted in this matter. Under section 5 of the Hindu Marriage Act XXV of 1955, the marriage itself could be solemnised as between these parties without permission of Court, the bride being above 15 years of age (she is 16 years old now) and the bridegroom having completed the age of 18. Permission of Court was prayed for, purely for the reason that the bride was a Ward of Court, and her step-mother was the personal and property guardian appointed as such under the Guardians and Wards Act. Further, it is important to emphasise that all the near relatives concerned acquiesced in the proposed alliance during the proceedings in the Court below.

The true perspective of approach, in considering a matter of this kind, has been clearly indicated by Their Lordships of the Calcutta High Court in *Monijan Bibi* v. *District Judge, Birbhum*[1]. The decision of the Bombay High Court in *Dahyabhai Marghabhai Patel* v. *Bai Divali*[2], follows and reiterates the same principle. As the Calcutta High Court observes, it is no function of a District Judge, in deciding a matter of this kind, to constitute himself as a matrimonial agency in the sense that he feels himself bound to consider whether that was the best offer, or a better offer might not eventuate later. On the contrary, where the immediate relatives were united in affirming the desirability of this proposal, the ordinary approach should be that sanction should be given, unless the Court is able to discover some substantial objection against the alliance. This is not at all the case here. Apart from this, I have questioned the minor (the bride, in Chambers), and she definitely states that the proposed alliance is greatly to her liking, and that she does not desire that any alternative offer should at all be considered by those interested in her welfare. She is a girl of over 16 years, and seems to me to be quite intelligent, and very well capable of forming a judgment in her own interest. I must further emphasise that she is a minor only in a strictly legal sense, and that under the personal law governing the parties, she is competent to contract this alliance even without permission of Court.

Under the circumstances, I allow the appeal, setting aside the order of the Lower Court, and direct that the permission sought for be accorded now. Parties to bear their own costs.

P.R.N. *Appeal allowed. Order set aside.*

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1. (1915) I.L.R. 42 Cal. 351.
2. A.I.R. 1939 Bom. 366.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Nanjappan .. *Petitioner.**

Madras Forest Act (*V of* 1882), *section* 26 *and rule* 13 (*iii*) *framed under the Act—Removal of silt in unreserved land* (*tank bed*) *for* bona fide *domestic or agricultural purpose—Not an offence.*

Under clause (iii) of rule 13 of the Rules framed under Madras Forest Act (V of 1882), section 26 in unreserved waste land the public may be allowed to quarry for *bona fide* domestic or agricultural purposes without obtaining permission for quarrying. Where the finding is that the accused removed only one cart load of silt from a tank bed, it is quite clear that he must have removed the same for *bona fide* domestic or agricultural purpose. No offence is therefore made out.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Erode, dated 29th September, 1958 and made in C.C. No. 192 of 1958.

V. P. Raman, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Court made the following

ORDER.—The 1st accused has been convicted under section 26 of the Madras Forest Act and sentenced to pay a fine of Rs. 10. Another accused also was charged as he was alleged to be the master of the 1st accused. The alleged master has been acquitted.

According to the prosecution, the 1st accused is said to have removed 100 cart-loads of silt from the tank bed which is said to be poromboke land. The learned Judge finds that according to the evidence what is proved is that the 1st accused removed one cart load, because that is what the witnesses saw on the particular day. The question is whether the removal of one cart load of silt is an offence under section 26.

At the outset it must be pointed out to the Magistrate that section 26 does not create and offence. It only enables the Government to frame rules. There is no offence as such under section 26. If the Sub-Divisional Magistrate had looked into the section, he would have realised this. Apparently what the accused was charged with was for having removed 100 cart loads and thereby violated rule 13, clause (iii) of the rules framed under section 26 of the Act. The land is unreserved land. The rules relating to this are framed under section 26. Under clause (iii) of rule 13, in unreserved waste land the public may be allowed to quarry for *bona fide* domestic or agricultural purposes without obtaining permission for quarrying. This being an unreserved land and the finding being that the 1st asccused removed only one cart load, it is quite clear that he must have removed the same for *bona fide* domestic or agricultural purpose. No offence therefore is made out. The conviction and sentence are set aside and the 1st accused is acquitted. The fine, if paid, will be refunded.

V.S. *Conviction and sentence set aside.*

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* Crl.R.C. No. 36 of 1959.
(Crl.R.P. No. 36 of 1959.)

27th October, 1959.
(5th Kartika, 1881—Saka.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE RAMASWAMI.

The State of Madras represented by the Collector of Tanjore .. *Appellant**

v.

Kamakshia Pillai and others .. *Respondents.*

Madras Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 3 (b) and Madras Land Encroachment Act (III of 1905), section 2—Fishery rights in tanks in an erstwhile estate—Whether vests in the Government on the abolition of the estate—Customary fishery rights of ryots if saved—Applicability of the provisions of Land Encroachment Act.

Where a land which was an 'estate' originally and which has ceased to be so by virtue of the provisions of the Madras Estates Land (Abolition and Conversion into Ryotwari) Act, 1948, and which has become ryotwari attracting all the enactments applicable to ryotwari lands, the aggrieved parties should resort to the same remedies as are open to the ryotwari ryots, *viz.*, apply to the revenue authorities for proper remedy. Section 3 (*b*) of the Act vests the entire estate in the Government which would comprise the tanks and the fishery rights in the former estate. The customary rights of the ryots to fish in the tanks could not avail against the Government after the vesting of the estate in the Government. The fact that no compensation is provided for in respect of such rights or that no provision is made in the Act for recognition of such rights is no ground to hold that such rights do not vest in the Government.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 161 of 1956 preferred against the decree of the Court of the District Munsif of Tanjore in O.S. No. 158 of 1955.

The Advocate-General (*V. K. Tiruvenkatachari*) and The Government Pleader (*K. Veeraswami*), for Appellant.

G. R. Jagadisan, for Respondents.

The appeal first came on for hearing before *Ramaswami, J.*, who made the the following

ORDER :—The point in controversy here deserved to be examined by a Bench. It is this. In the case of a tank which is situated on a poramboke land inside an estate the ryots have been enjoying as customary right the right of fishing. No doubt a derivative title from the landholder has been put, but, this need not concern us now. This estate has been taken over. The short question is, whether this taking over of the estate is in liquidation of all the rights of the landholder, as also liquidation of the rights of the ryots who have been enjoying a customary right in this pond. In this connection the term "fishery" used in section 3 (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948 has got to be considered. Does it mean the mere taking over of the profits of the soil which goes along with the ownership of the tank, or, does it extend to a case of this kind? The decisions on this point are not uniform. It is therefore better that this matter is decided by a Bench.

Place this second appeal before my Lord the Chief Justice for orders regarding being posted before a Bench.

The appeal then came then came on for hearing in pursuance of the aforesaid order before a bench of (*Basheer Ahmed Sayeed* and *Ramaswami, JJ.*).

The Court delivered the following

JUDGMENTS : (*Ramaswami, J.*).—This second appeal is preferred against the decree and judgment of the learned Subordinate Judge of Tanjore in A.S. No. 161 of 1956, reversing the decree and judgment of the learned District Munsif of Tanjore in O.S. No. 158 of 1955.

In Kulamangalam village, which formed part of an estate, there is a poromboke tank in which the ryots of Kulamangalam village have for over a long time been enjoying the right to fish. This village was notified and taken over on 9th December,

* Second Appeal No. 633 of 1957. 4th September, 1959. (13th day of Bhadra 1881—Saka.)

1952 under the Madras Act XXVI of 1948. The ryots were prevented from exercising their right to fish in this poromboke tank. Thereupon they filed the suit, out of which this second appeal arises, claiming in the first instance the tank as well as a customary right to fish therein and prayed for a declaration and injunction or in the alternative for recovery of possession. It is not necessary to discuss about the tank situate in S. No. 48/1, because the claim of the plaintiffs has subsequently been confined to asking for a protection of the customary right to fish by means of appropriate reliefs. The learned District Munsif held that the plaintiffs were not entitled to a decree and on appeal the learned Subordinate Judge has granted them a declaration that the plaintiffs (ryots) are entitled to a customary right of fishery in the suit tank and an injunction restraining the State of Madras from interfering with that right. Hence this second appel by the State of Madras.

The controversy as now crystallised may be put as follows : That the Kulamangalam ryots have been customarily fishing in this poromboke tank situate within the ambit of an estate cannot be disputed. It is also said that when the landholder became insolvent the ryots purchased the rights regarding this tank in a public auction from the Official Receiver. This village Kulamangalam has been notified and the Goverment have taken over the entire estate on 9th December, 1952. Section 20-A (1) of Madras Act I of 1908 directs the Collector to have due regard to any other customary rights of the landholder or the ryots before making any declaration under section 20-A (1). But on and with effect from the date of notification, Act I of 1908 ceased to apply. The provisions of section 3 (*b*) of Act XXVI of 1948 are specific and unqualified and unreserved, *viz.*, that the *entire estate*, including porombokes, tanks and fisheries shall stand transferred to the Government and vest in them. Now under Act XXVI of 1948 whereas a patta can be applied for by a ryot or a landholder under sections 11 to 15 of the Act, there is no provision in it for these plaintiffs to apply for a patta for their fishery right and since the rights which they claim are not the creation of the landholder, they cannot get any benefit by way of compensation or otherwise under the provisions of the said Act. Consequently, the plaintiffs have been contending that Madras Land Encroachment Act (Act III of 1905) recognises customary rights and Act XXVI of 1948 does not provide for any remedy or relief for them and therefore it will be appropriate for the civil Court to recognise and declare their rights and grant the reliefs prayed. On the other hand, the contention of the Government was that the plaintiffs should work out their rights, if any, only under the provisions of Act XXVI of 1948, if there are any express provisions in the said Act, and that Act III of 1905 has no application whatsoever to these lands and that the possible remedy is probably a petition to the Board of Revenue and Government under the general provisions of the Board's Standing Orders, since the tract is now ryotwari : *vide* B.S.O. 18, Rule 1). It would appear that petitions to the Collector have been rejected. But apparently at that stage the petitions were for both the tank S. No. 48/1 as well as the right to fish. It would not preclude them from petitioning again for the recognition of the limited customary right in an appropriate manner permissible under the Board's Standing Orders.

Therefore the primary question which arises before us is whether section 2 of Madras Act III of 1905 applies to this case. Before entering into a discussion of the scope of section 2 of Madras Act III of 1905, in regard to which the law has become settled, I shall briefly notice the circumstances that led to the passing of that Act.

In the case of unauthorised occupation of lands which are the property of Government, it levies from the persons who so occupy what is known as "penal or prohibitory assessment or charge". The history of this assessment or charge is this : Originally treating such unauthorised occupations as offences, Government was prosecuting in criminal Courts the occupants thereof, but in 1869, the High Court held that unauthorised occupations were not offences, and that if such holders were to be ousted by Government, they must apply to civil Courts. Thereupon in order to avoid this difficulty, Collectors were authorised to impose prohibitory assessment with a view not to punish the intruder, but to make him quit the land which he had unauthorised-

ly occupied. To effecuate this object, the assessment was not calculated on the half net or any other principle but was fixed sufficiently heavy to compel the immediate surrender of the land, and it was increased from year to year until such surrender, amounting in certain cases even to one hundred times the ordinary assessment. It was really intended more as a fine than as assessment strictly so called. Government was collecting this assessment as an arrear of land revenue under the provisions of Act II of 1864, and this procedure had been adopted ever since its institution in 1869. The legality of this procedure, however, was questioned in the case of *Madathepu Ramaya* v. *The Secretary of State*[1]. In that case the plaintiff put up a shed and pial to his house upon land which was part of a public highway ; and Government thereupon imposed and collected from him a prohibitory assessment and also gave him notice that thereafter an enhanced rate would be levied. Thereupon the plaintiff brought a suit, *inter alia*, for the recovery of the amount collected from him. It was held that the theory under which the land revenue in this Presidency was collected pre-supposed that the person from whom it was collected had an interest in the land and was recognised as landholder by the Revenue Recovery Act, that the prohibitory assessment was levied from a person not because he was a landholder, not on the basis that he had an interest in the land, but on the footing that he was a trespasser ; that therefore, the probibitory assessment was not an arrear of land revenue so as to attract the provisions of the Revenue Recovery Act, and that the amount collected from the plaintiff should be refunded. To counteract the effect of this decision and to legalise the existing practice, the Madras Legislature intervened and passed Act III of 1905. Though the immediate object of this enactment is to make the imposition of penal or prohibitory assessment legal, *occasion has been taken to declare what is Government property*. Section 2 declares what it is : *see* Sundararaja Iyengar's Land Tenures in the Madras Presidency, 2nd edition, pages 172-173, (for Statement of Objects and Reasons, see *Fort St. George Gazette*, Part IV, dated 23rd December, 1904, p. 595 ; for Report of the Select Committee, see *ibid.*, dated 27th February, 1905, p. 45; for Proceedings in Council, see *ibid.*, dated 28th February, 1905, p. 75, and *ibid.*, dated 18th April 1905, p. 206. The assent of the Governor-General to this Act was published in the *Fort St. George Gazette*, dated 6th June, 1905).

The sum and substance of the decisions on section 2 of Act III of 1905 is : Section 2 declares, subject to the saving clauses, that the Government is the owner of certain kinds of property which kinds of property are defined as those which are not the property of any one else and which are enumerated in the section itself. In regard to these unappropriated properties which are declared to be Government property, they are again subjected to the saving clause which declares that the Act does not affect pre-existing rights therein and does not supersede the rights of riparian proprietors. This is not a vesting declaration but a property declaration. The terms of section 2 also show that this property declaration is with reference to unappropriated properties existing in 1905 and in fact the declaratory Act exhausts itself with this property declaration. It is quite true that subsequently there can be acquisition of title and extinction of title of Government in regard to these lands covered by the provisions of Act III of 1905. But such acquisitions and extinctions of rights will not be under the Act, but will be under other statutes and Common Law of the land. The decisions embodying these principles are : *Secretary of State* v. *Janakiramayya*[2], *Kandukuri Balasurya Prasadha Rao* v. *Secretary of State for India*[3], *Secretary of State* v. *Ambalavana*[4], *Kandukuri* v. *The Secretary of State*[5], *Chinnappan Chetty* v. *Secretary of State for India*[6], *Maharaja of Vizianagaram* v. *Secretary of State for India*[7]; *Secretary of State* v. *Alex Pinto*[8], *Appa Rao* v. *Secretary of State for India in Council*[9].

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1. (1903) 14 M.L.J. 37 : I.L.R. 27 Mad. 386. (F.B.).
2. (1911) 23 M.L.J. 109 : I.L.R. 37 Mad. 354.
3. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).
4. (1917) 33 M.L.J. 415.
5. (1918) 35 M.L.J. 159 : I.L.R. 41 Mad. 840
6. (1918) I.L.R. 42 Mad. 239 (F.B.).
7. (1925) 50 M.L.J. 391 : L.R. 53 I.A. 64 : I.L.R. 49 Mad. 249 P.C.
8. A.I.R. 1937 Mad. 212.
9. (1938) 2 M.L.J. 434.

One of the exempted lands under Act III of 1905 is the estate land of which Kulamangalam forms part and which has been taken over under Act XXVI of 1948. It will be seen, therefore, that when Kulamangalam was taken over and became ryotwari land, this tax would not fall within the category of lands declared to be Government property under Act III of 1905, since section 2 of that Act exempts both estate lands as well as ryotwari lands.

The next branch of argument therefore is that this fishery right was not taken when the entire estate vested in the Government on account of two reasons which are put forward, *viz.*, that there can be no vesting unless what is vested is compensated for and this has not been the case here ; and secondly, this customary right to fish falls outside the vesting contemplated by Act XXVI of 1948.

The line of argument that because the plaintiffs would not be entitled to be compensated and this is the stand taken by the learned advocate for the plaintiffs—and therfore there cannot be a vesting, need not be discussed at great length. The learned Advocate-General has pointed out how this point is concluded by authority, *viz.*, that the principle of giving compensation cannot be invoked in cases of this nature and which was held in *Zamindar of Ettayapuram* v. *State of Madras*[1], and *Veerappa Chettiar* v. *State of Madras*[2].

In regard to vesting, the general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and the title to a fishery grows from the right to the soil. But in certain circumstances in regard to private fisheries, the fishery may be severed from the soil. The owner of a private fishery may of course give general permission to the ryots of the village to use the fishery or by reason of ignorance, generosity, good nature, carelessness or indulgence take no steps to prevent the villagers fishing in his fishery; Halsbury's *Laws of England*, 3rd Edition, Volume 17, page 297 and following. (See *Ramnad case*)[3]; *Ananda Bahara* v. *State of Orissa.*[4] In course of time this would mature into a customary right. But even in such a case what happens is that the right of the owner of the fishery to fish gets extinguished and the rights of the villagers to fish becomes matured and indefeasible. In other words, the customary right claimed in this case is divestative so far as the landlord is concerned and investitive so far as the ryots are concerned. Would this right pass to the Government along with the estate when taken over ?

That the *entire* estate vests is made clear by section 3 (*b*) of Act XXVI of 1948, and the scope of section 3 (*b*) has been examined in the following decisions : *State of Madras and another* v. *V. Srinivasa Ayyangar*[5], *Zamindar of Ettayapuram* v. *State of Madras*[6] *Chidambaram Chettiar* v. *Md. Aliar Rowther*[7] *Appanna* v. *Sri Ramamurthi*[8], *State of Madras* v. *Karuppiah Ambalam*[9], and *Sovsai Udayar* v. *Andiyappan*[10]. (*See also* C.M.P. No. 5156 of 1951 ; S.A. No. 620 of 1957). This entire estate would certainly comprise the tank and the right to fish which is always held to be immoveable property. In addition, section 3 (*g*) of Act XXVI of 1948 makes it clear that any rights and privileges which may have *accrued* in an estate, to any person before the notified date, against the principal or any other landholder thereof, shall cease and determine, and shall not be enforceable against the Government or such landholders and every such person shall be entitled only to such rights and privileges as are recognised or conferred on him by or under this Act ; vide *Saraswathi Bai* v. *Chairman, E. A. T. Madurai*[11], and *State of Madras* v. *Karuppiah Ambalam*[9].

The net result of this analysis is that when a land which was an estate and to which the provisions relating to lands permanently settled have ceased to apply and have become ryotwari and to which all enactments applicable to ryotwari lands shall apply—there can be no interregnum as absolute Government property as postulated

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1. (1954) 1 M.L.J. 486 : 1954 S.C.R. 761 : (1954) S.C.J. 282 (S.C.).
2. A.I.R. 1954 S.C. 605.
3. (1953) 2 M.L.J. 537: I.L.R. (1953) Mad. 1175 :
4. (1956) 1 M.L.J. (S.C.) 69: (1955) 2 S.C.R. 919 : (1954) S.C.J. 96.
5. (1956) S.C.J. 89: (1956) 1 M.L.J. (S.C.) 63 : (1955) 2 S.C.R. 907.
6. (1955) 1 M.L.J. 264.
7. (1957) 1 M.L.J. 244.
8. (1953) 1 An.W.R. 420.
9. (1959) 1 M.L.J. 185.
10. (1959) 1 M.L.J. 195.
11. (1956) 1 M.L.J. 200.

by Mr. G. R. Jagadisan as the former ceasing and the latter application are simultaneous—the aggrieved plaintiffs should resort to the same remedies as are open to the ryotwari ryots, *viz.*, proceed under the provisions of the Board's Standing Orders and petition the revenue authorities.

Therefore, the conclusion of the learned District Munsif, though for entirely different reasons, that the plaintiffs are entitled to no relief in this suit is correct and the declaration and injunction granted by the learned Subordinate Judge are totally unwarranted. The deceree and judgment of the learned Subordinate Judge are set aside and the dismissal of the suit by the learned District Munsif is upheld. This second appeal is allowed and in the circumstances we direct that each party do bear his costs throughout.

Before parting with this appeal we must place on record our indebtedness to the lucid and informed arguments of the learned Advocate-General which have considerably lightened our labours and enabled us to approach the case from the proper perspective.

Before parting with this appeal, I also wish to record that this is a hard case and though hard cases should not be the provocation for laying bad law, this is an eminently fit case for the Government to ameliorate the grievance of the village ryots on application by appropriate reliefs open under the Board's Standing Orders.

Basheer Ahmed Sayeed, J.—I have had the benefit of perusing the judgment of my learned Brother, which has just been pronounced. I wish to add a few words of my own.

The point that arises for consideration in this second appeal is whether section 2 (1) of the Madras Land Encroachment Act (Act III of 1905) could be applied with retrospective effect to the right that is claimed in the suit out of which this second appeal has arisen. The right involved in this second appeal is a fishery right. According to the decisions of the Court and that of the Supreme Court, the right to fishery has been held to be an immovable property and there is no controversy with regard to the nature of this right. It is also conceded that the fishery right in question is in respect of a tank which is situated in a poromboke land in the estate, which has been notified under Act XXVI of 1948, *viz.*, the Madras Estates (Abolition and Conversion into Ryotwari) Act. It has further been made clear in the course of the arguments that the respondents in this appeal do not claim the right to fishery in this poromboke tank under the provisions of Act XXVI of 1948. They only claim on the other hand that their right remains unaffected by the notification by reason of the operation of section 2(1) of Act III of 1905, the Madras Land Encroachment Act.

Kulamangalam Village, which formed part of an estate, was notified under Act XXVI of 1948, the Madras Estates (Abolition and Conversion into Ryotwari) Act, and it was taken over by the Government on 9th December, 1952. Under section 3 (*b*) of the said Act XXVI of 1948 the entire estate vests in the Government. It has been argued by the learned Advocate-General that the term ' estate ' is used in section 3 (*b*) as connoting the entire geographical area of the estate, which becomes abolished by operation of the said section, and the entire estate thereafter becomes vested in the Government. Consequently, all the enactments, which are applicable to ryotwari lands, will apply to the estate so notified and vested in the Government, which means that after the vesting takes place, it is taken outside the purview of the Madras Estates Land Act. The land becomes Government land and all the enactments that apply to the Government lands would also operate upon this geographical extent of land since notified and taken over by the Government. Under Section 3 (*g*) of the said Madras Estates (Abolition and Conversion into Ryotwari) Act, any rights and privileges which may have accrued in the estate to any person before the notified date, against the principal or any other landholder thereof, shall cease and determine; and shall not be enforceable against the Government or such landholders, and every such person shall be entitled only to such rights

and privileges as are recognised or conferred on him by or under this Act. This sub-clause appears to be only an elaboration of the phrase employed in section 3 (*b*), *viz.*, that the entire estate vests free of all encumbrances in the Government and stands transferred to the Government with the qualification that the person in whose favour any rights and privileges might have accrued in the estate before the notified date will be entitled only to such rights and privileges as are recognised or conferred on him by or under the Act, Madras Act (XXVI of 1948) and nothing more. One of the Acts applicable to ryotwari areas and which may also become applicable to the estate abolished and taken over by the Government would be no doubt the Madras Land Encroachment Act (Act III of 1905) as laid down under section 3 (*b*). The purport of this sub-section (*b*) of section 3 is that as a consequence of the notification of the estate with effect on and from the notified date, the Madras Land Encroachment Act and all other Acts applicable to the ryotwari lands will have operation on the lands in the estate since abolished. Therefore, it is only after the abolition and after the vesting has taken place that the enactment, *viz.*, the Madras Land Encroachment Act of 1905, would come into play so far as the abolished estate is concerned.

As against this contention of the learned Advocate-General, the contention of the learned counsel for the respondents would appear to be that the Madras Land Encroachment Act and particularly section 2 (1) thereof has retrospective effect and by virtue of such retrospective effect the rights and privileges, which have accrued in favour of the respondents prior to the notification, become saved, and not lost by the abolition. If section 2 (1) of the Land Encroachment Act is read along with section 3 (*b*) and (*g*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, it is difficult to see how exactly section 2 (1) of the Madras Land Encroachment Act would be of any avail to the respondents so as to save their prior rights.

Under Act (III of 1905), *viz.*, the Madras Land Encroachment Act, all lands wherever situated except the property of zamindar, pattadar, jenmi etc. are declared to be Government property as on 6th June, 1905, except as may be otherwise provided by any law, subject always to all rights of way and other public rights, easements, etc. of other landowners and to all customary rights legally subsisting. The Madras Land Encroachment Act was a declaratory act and the effect of that legislation was to the effect that what was not any other man's property become the property of the Government as on the date of the legislation coming into force, barring certain rights specified in the said declaratory provision which attach themselves to the land declared to belong to the Government. It is clear that it was not the zamindari estate or the estate of the poligar, or the pattadar or any jenmi that was declared to be the Government property under the Madras Land Encroachment Act. But on the other hand, this category of properties formed the category of excepted properties as could be seen from the language of section 2 (1) of the Madras Land Encroachment Act. The Madras Land Encroachment Act, being a declaratory measure, had already exhausted itself in its scope and application as to the character of the lands when once the declaration was made and all lands barring the excepted lands had become vested in the Government. The vesting by declaration took place in favour of the Government under the said section 2 (1) of the Madras Land Encroachment Act, and only thereafter the situation would arise as to whether any lands so vested in the Government could be lost to the Government by reason of other people claiming rights thereto, which might have accrued in their favour by operation of any law. That is to say, the operation of the Madras Land Encroachment Act or its application in other words, would arise only after the land has been declared to have become vested in the Government and not to any state of things prior thereto. In the present case, the estate in question becomes vested in the Government only on and after the date of notification under the Estates Abolition Act. Therefore, the Madras Land Encroachment Act could be made applicable to this estate only on and after the notification takes effect and not to any state of things existing at any prior point of time. That is the effect of the latter part of section 3 (*b*). Such being the case, the claim of the respondents that under the

Madras Land Encroachment Act their rights to any easements or privileges that existed before the abolition are left in tact and without being affected by the Estates Abolition Act seems to be rather unintelligible. When the operation of the Madras Land Encroachment Act could itself arise only after the date of the notification, to say that by reason of section 2 (1) of the Madras Land Encroachment Act the rights, which the respondents had in the matter of fishery in the poramboke tank are reserved to them and that these rights should be accepted and acknowledged by the Government, when the Abolition Act is implemented and worked out, seems to be a very difficult position to understand. No authority has been cited by the learned counsel for the respondents to support the proposition that retrospective application of any section of the Land Encroachment Act is permissible when the land comprised in the estate itself becomes vested in the Government by reason of a notification under a later Act and only on and from the date of the notification under the said Act, *viz.*, the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. In *Madathapu Ramayya* v. *The Secretary of State for India*[1], and *Secretary of State for India* v. *Maharajah of Bobili*[2], it was held that the Madras Land Encroachment Act got itself exhausted on the day when the declaration took place about the non-excepted lands and no contrary decision has been cited by the learned counsel for the respondents. The exact scope of section 2 of the Madras Land Encroachment Act has been dealt with in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*[3]. At pages 421 and 422, Abdur Rahim, J., observed that the scope of the section was only to declare that certain classes of properties, which did not belong to any individual private proprietor belonged to the Government. The decision in *Chinnappan Chetty* v. *The Secretary of State for India*[4] is also to the same effect. Act (III of 1905) only dealt with non-excepted lands, by declaring them as property belonging to the Government; whereas Act (XXVI of 1948) deals with one category of those excepted lands, *i.e.*, the zamindary estate, which actually falls within clause (*a*) of section 2 of the Madras Land Encroachment Act.

Mr. Jagadisa Ayyar, however, argued that what is being claimed by the ryots now is only a customary right, distinct and apart from the ownership of the tank. It is claimed as a right based on long usage, which vests in the respondents as an independent right being dissociated from the ownership of the bed of the tank. He contended that the right is not claimed against any landholder or individual, though it is a right carved out of the landholder's right to the entire tank. According to him, the fishery right claimed was an incorporeal right and it has accrued in favour of the respondents independently of the owner. It is difficult to understand this argument of the learned counsel for the respondents. The right to a fishery in a tank, the bed of which is not owned by the claimants can be claimed, and enjoyed only as against the owner of the bed of the tank. It cannot hang in the air, and the person, who can object to the right claimed, will be only the owner of the bed of the tank, who is also entitled to the waters in the tank and also to the produce that accrues to him in the tank, unless somebody else has perfected his right thereto by any prescriptive law of easement. Mr. Jagadisa Ayyar, further argued that by reason of the long usage, the respondents and the zamindar must be deemed to have become co-owners of the tank and the produce thereof, the zamindar owning the bed of the tank and the respondents owning the right to fishery, that is the produce thereof. So, he contended that on the date when the entire estate vested in the Government under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, only that proprietary right in the tank which the zamindar was possessed of would vest and not the fishery right therein, which had ceased to be his. In other words, he argued that the fishery right would not be vested in the Government by reason of the notification, even though the vesting is said to be of the 'entire estate'.

Mr. Jagadisa Ayyar pressed into service the preamble to the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, which is to the effect that the

1. (1903) 14 M.L.J. 37 : I.L.R. 27 Mad. 386 (F.B.).
2. (1915) 30 M.L.J. 163.
3. (1917) 33 M.L.J. 415.
4. (1918) I.L.R. 42 Mad. 239.

legislative measure is enacted to provide for the repeal of the permanent settlement, the acquisition of the rights of landholders in permanently settled and certain other estates in the Province of Madras, and the introduction of the ryotwari settlement in such estates. He also cited passages in Maxwell on Interpretation of Statutes at pages 44 and 288 in support of the view that a preamble can be a guide to find out the intention of the legislative enactment and its meaning, and also the view that the statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction so as to respect the rights of the persons. The aim and object of the Abolition Act he argued was only to acquire the rights of the landholders in permanently settled estates and not to acquire the rights of other individuals in the estates. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, defines the term ' estate ' as a zamindary estate or an under-tenure or an inam estate. The term ' zamindari estate ' in turn is defined as (1) an estate within the meaning of section 3, clause (2) (*a*) of the Estates Land Act after excluding therefrom every portion which is itself an estate under section 3, clause (2) (*b*) or clause (2) (*e*) of that Act, and (2) an estate within the meaning of section 3, clause (2) (*b*) or clause (2) (*c*) of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause (2) (*e*) of that Act. I am unable to agree with the learned counsel for the respondents when he says that what is acquired by the Government under the Abolition Act is not the right of the ryots in the tank for fishing but only the right of the landholder to the tank bed and its waters. This position would be a direct negation of what is sought to be achieved under section 3 (*b*) and (*g*) of the Abolition Act.

The tank consists of the bed and the fishery rights, and from this the learned counsel argues that while the bed of the tank alone which belongs to the landholder has been acquired, the fishery right is left in tact as it does not belong to the landholder. He seeks support for this view from the fact that whereas compensation is provided for every other right in the estate acquired by the Government, there is no compensation made payable for the fishery right. If no compensation has been fixed for the fishery right, which is sought to be taken over by the Government under section 3 (*b*), then it follows that the fishery right is not intended to be acquired. He further argued that though the landholder gets compensation for the entire estate —that compensation does not include compensation for the right to fishery therein, as that right was not that of the landholder. Even if all the rights of the landholder in the tank are sought to be acquired by the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, still in so far as no compensation has been provided for the fishery right, the Abolition Act being an exproprietary statute, it must be deemed that what is not compensated for is not taken over by the Government. That is to say when no compensation is made payable, there can be no vesting in favour of the Government of anything not compensated for and so a declaration and an injunction against the Government would be quite warranted and justified in the premises. But Mr. Jagadisa Ayyar conveniently forgets the rulings of the Supreme Court in a series of decisions cited by the learned Advocate-General in *Zamindar of Ettayapuram* v. *State of Madras*[1], *Veerappa Chettiar* v. *State of Madras*[2], *Ananda Behara* v. *State of Orissa*[3] and *Muthu Velu* v. *State of Madras*[4], wherein it has been laid down that the principle of compensation cannot be invoked in support of the contention that what is not compensated for is not acquired by the Government. These rulings do not allow any more scope for an argument like the one now advanced.

My learned Brother has discussed in detail the scope and application of the various decisions to the facts arising in this appeal, and it is not necessary for me to repeat them over again. I agree with him in the view expressed by him.

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1. (1954) 1 M.L.J. 486 : (1954) S.C.R. 761 : 1954 S.C.J. 282 (S.C.).
2. A.I.R. 1954 S.C. 605.
3. (1956) 1 M.L.J. (S.C.) 69 : (1955) 2 S.C.R. 919 : (1956) S.C.J. 96.
4. (1954) 2 M.L.J. 636: I.L.R.(1955) Mad. 233.

In the result I agree with my learned Brother that the decision of the learned Subordinate Judge deserves to be set aside and that this Second Appeal should be allowed without any costs. I would also endorse the opinion expressed by my learned Brother that the Government would be doing only justice if the grievance of the ryots is redressed by according suitable reliefs to them in the matter of the right claimed.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

K. P. C. Menon .. *Petitioner**

v.

Divisional Manager, Life Insurance Corporation of India, Coimbatore .. *Respondent.*

Life Insurance Corporation Act (XXXI of 1956), *section* 49 (2)—*Life Insurance Corporation of India (Staff) Regulations* (1956), *Regulations* 20 *and* 41—*Applicability and scope of—Termination of service on notice—Validity of—Allegation of misconduct on part of employee—Absence of inquiry—Effect—Power of Corporation to terminate service on notice—Constitution of India* (1950), *Article* 311—*Applicability—Service under Corporation—If service under Government—Breach of Regulation by Corporation—If justiciable—Constitution of India* (1950 , *Article* 226.

The provisions of Regulations 20 and 41 of the Life Insurance Corporation of India (Staff) Regulations, 1956, framed under section 49 of the Life Insurance Corporation Act, 1956, bear a close analogy to the normal rules of common law governing contracts of employment between master and servant. Normally the master, in the absence of any contract to the contrary, is entitled to terminate the services of an employee either on giving a reasonable notice or without notice on the ground of misconduct. The master is not, under the common law, bound to institute an inquiry and afford his servant an opportunity of proving his innocence, but misconduct of the employee can be proved as a defence to an action for damages, and when established, would afford the employer complete immunity from any claim on the employee's part. If, however, in case where misconduct is suspected, the master serves the requisite notice, he is not thereafter bound to prove misconduct and establish it if subsequently the servant disputes the propriety or legality of the dismissal.

Even if an employee of the Life Insurance Corporation was guilty of misconduct or inefficiency such as would enable the corporation or its competent official to terminate the services of an employee without notice, but after inquiry, it would be open to the corporation to terminate his services by giving the requisite notice under Regulation 20 and the corporation is not compelled to take action under Regulation 41.

There is no basis for the contention that there is a complete dechotomy between Regulation 20 and Regulation 41 and that every case of suspected misconduct or inefficiency is governed by Regulation 41 and that the service of such an employee cannot be terminated on notice under Regulation 20.

Where the requisite notice under Regulation 20 is given and the termination is effected by an official competent to do so, the termination is in accordance with the terms of the employment and cannot be complained of as invalid.

Employment under the Life Insurance Corporation is not employment in the service of Government which would attract Article 311 of the Constitution.

Narayanaswami Naidu v. *Krishnamurthi*, (1958) 1 M.L.J. 367, referred to.

Quaere.—Whether, if there was a violation by the Life Insurance Corporation of the Regulation under which the termination of the employment took place, it would be justiciable and be subject to the jurisdiction of the High Court under Article 226 of the Constitution of India.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the letter of termination from service, dated 13th July, 1957, issued by the Divisional Manager, Life Insurance Corporation of India, Coimbatore Division and quash the order made therein.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for *K. C. Jacob* and *S. K. L. Ratan*, for Respondents.

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* W.P. No. 1014 of 1957. — 1st October, 1959. (9th Asvina, 1881—Saka).

The Court made the following

ORDER.—The Petitioner was formerly an Inspector employed in the Life Insurance Corporation of India. His services having been terminated by the Divisional Manager of this Corporation, he has filed this Writ Petition for the issue of a Writ of *Certiorari* to quash this order of termination.

Before the Life Insurance Corporation was set up by Act of Parliament, the Petitioner was a Branch Manager in an Insurance concern, known as the General Assurance Society. He was in charge of the Coimbatore branch of this Society and was drawing a salary of Rs. 575 a month. With the coming into force of the Life Insurance Corporation by Act (XXXI of 1956), the business of the General Assurance Society was taken over by Government and vested in the Corporation and the Petitioner became an employee of the Corporation. By an order dated 16th August, 1956, the Petitioner was appointed as the Inspector at the Coimbatore Branch Office of the Corporation. By a notice served on him on 13th July, 1957 by the Respondent, the Divisional Manager of the Corporation at Coimbatore, the appointment of the Petitioner was terminated he being given a month's notice. It is the validity of this order of termination that is challenged in this Petition.

This order of termination is impugned on the ground that the same was passed in violation of the conditions of the Petitioner's appointment. As regards this, two points were urged by Mr. Mohan Kumaramangalam, learned counsel for the Petitioner. The first was that the termination of the Petitioner's appointment was in substance under Regulation 41 of the Staff Regulations of the Corporation under which the termination had to be preceded by the framing of a charge, the holding of an enquiry and a finding of the guilt. It is common ground that no charges were framed against the Petitioner and no enquiry was held before the Petitioner's appointment was terminated. In doing so, the Corporation proceeded on the basis that the termination was one under Regulation 20 of the Staff Regulation under which the services of an employee could be terminated on a month's notice.

The first question raised therefore, is whether the termination of the Petitioner's appointment was really under Regulation 41 or under Regulation 20. Before, however, these regulations are referred to, it is necessary to advert to the provisions of the Life Insurance Corporation Act bearing upon the employment of persons previously employed in insurance companies whose businesses were taken over. Under section 11 (1) of the Life Insurance Corporation Act (Act XXXI of 1956),

"Every whole time employee of an insurer whose controlled business has been transferred and vested in the Corporation and who was employed by the insurer wholly or mainly in connection with his controlled business immediately before the appointed day shall, on and from the appointment day, become the employee of the Corporation, and shall hold his office therein by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension and gratutity and other matters as he would have held the same on the appointed day if this Act had not been passed, and shall continue to do so unless and until his employment in the Corporation is terminated or until his remuneration, terms and conditions are duly altered by the Corporation ".

Sub-section (2) of this section gives power to the Central Government for varying contracts of service in order to rationalise the pay scales. Section 49 of the Act vested in the Corporation power, with the previous approval of the Central Government, to make regulations not inconsistent with the Act to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of the Act. In particular the Corporation was enabled to make regulations providing for the method of recruitment of employees and agents of the Corporation and the terms and conditions of such employees or agents.

In conformity with the terms of section 49 (2), the Life Insurance Corporation framed Regulations, *inter alia*, entitled "The Life Insurance Corporation of India (Staff) Regulations 1956 ", which applied to every whole time employee of the Corporation. Section 3 of Chapter II of these Regulations contains provisions relating to the termination of service. This section contains two Regulations 20 and 21 and Regulation 20 provides for the termination of the services of employees by notice. Paragraph 1 of this Regulation enables employees to leave or discontinue their

services in the Corporation after service of notice in writing, and the further portions of this paragraph prescribe the duration of the notice which varied with the class to which the employee belonged. Paragraph 2 made provision for the determination of service of the employees by the Corporation and as this is the provision under which the Respondent acted in the present case, I shall set out the relevant portions of this Regulation :—

" 20. (2) The Corporation may determine the service of any employee at any time after the expiry of the period of his probation on giving him

(*a*) three months' notice or pay in lieu thereof, if he is an employee in Class I; and

(*b*) one month's notice or salary in lieu thereof, if he is an employee in any other class:

Provided, however, that the period of notice will be doubled in the case of employees who have served for 10 years or more.

The power to determine the service of an employee shall be exercised by the authorities empowered under Regulation 9 ".

Paragraph (3) is also relevant and it ran

" 20. (3) Nothing in sub-regulation (2) shall affect the right of the Corporation—

(*a*) to retire or dismiss an employee without notice or pay in lieu thereof in accordance with the provisions of Regulations 17 and 41 ; "

The other portions of the sub-regulation are not relevant and I am not quoting them :—

Regulation 41 which is referred to above ran :

" 41. (1) Without prejudice to the provisions of other Regulations, an employee who commits a breach of the Regulations of the Corporation, or who displays negligence, inefficiency or indolence, or who knowingly does anything detrimental to the interests of the Corporation or in conflict with its instructions, or who commits a breach of discipline or is guilty of any other act of misconduct, shall be liable to the following penalties :—

(*a*) reprimand ; or censure ;

(*b*) delay or stoppage of increment or promotion ;

(*c*) degradation to a lower post or grade or to a lower stage in his incremental scale ;

(*d*) recovery from pay of the whole or part of any pecuniary loss caused to the Corporation by the employee;

(*e*) dismissal.

(2) No employee shall be subjected to the penalties (*b*), (*c*), (*d*) or (*e*) of sub-regulation (1) above except by an order in writing signed by the appointing authority and no such order shall be passed without the charge or charges being formulated in writing and given to the said employee so that he shall have reasonable opportunity to answer them in writing or in person, as he prefers, and in the latter case his defence shall be taken down in writing and read to him :

Provided that the requirements of this sub-regulation may be waived in the case of employees belonging to Classes II and IV if action under Clause (*b*) or (*c*) of sub-regulation (1) is taken on account of low business production.

* * * * * * *

(3) The inquiry under this Regulation and the procedure with the exception of the final order, may be delegated to the competent authority."

In the order served upon the Petitioner by the Respondent dated 13th July, 1957 by which notice was given, it was stated :

" We regret to inform that in view of the poor progress made by you with regard to organization and business of the area entrusted to you, we have to terminate your appointment. Please note that your appointment will terminate at the end of the month from the day you receive the notice."

If by reason of this notice the termination of the employment was really one under Regulation 20, there could be no question about its validity. No reasons were required to be adduced to justify the termination and the only requisite of the Regulation was the giving of the prescribed period of notice. There was no dispute either that the duration of one month specified in the communication dated 13th July, 1957 satisfied the terms of Regulation 20.

The contention, however, urged by Mr. Mohan Kumaramangalam was that though purporting to be under Regulation 20, the termination of employment was really for misconduct under Regulation 41, with the consequence that the Corporation was bound to have framed charges against the Petitioner and afforded him an opportunity to show cause and that, in their absence the termination was invalid. In this connection, the learned counsel relied upon the reference to " the poor progress made by the Petitioner in regard to the organization and business of the area entrusted to him", and urged that this was really the sort of inefficiency referred to in Regulation 41 (1) read in the light of the first proviso to sub-regulation (2) thereof—" Low business production ". I feel unable to accept this contention urged on behalf of the Petitioner. The terms of the Petitioner's employment were such that the employment could be terminated either by notice of a fixed duration or after proof of misconduct or inefficiency. This would appear to correspond to the normal rules that govern contracts of employment at common law whereunder in the absence of any contract to the contrary, the master is entitled to terminate the service of an employee either on giving a reasonable notice or without notice on the ground of misconduct. Of course at common law, the master is not bound to institute an inquiry and afford the servant an opportunity of proving his innocence but misconduct of the employee could be pleaded as a defence to an action for damages, and when established would afford the employer complete immunity from any claims on the employee's part. If however in case where misconduct is suspected, the master serves the requisite notice, he is not thereafter bound to prove misconduct and establish it if subsequently the servant disputes the propriety or legality of the dismissal. Regulations 20 and 41 appear to bear a close analogy to these provisions of the common law. Even if an employee was guilty of misconduct or inefficiency such as would enable the Corporation or its authorised competent official to terminate the services of an employee without notice but after inquiry, it was open to the Corporation to terminate his service by giving the requisite notice under Regulation 20 and the Corporation is not compelled to take action under Regulation 41. The argument of the learned counsel for the Petitioner proceeded on the basis that there was a complete dichotomy between Regulation 20 and Regulation 41 and that to any case of suspected misconduct or inefficiency it was Regulation 41 that applied and that the service of such an employee eould not be terminated on notice under Regulation 20. I find no basis for such an argument. In my judgment, as the requisite notice under Regulation 20 was given and the termination of employment was effected by an Official competent to do so, the termination of employment was in accordance with the terms of the employment and cannot therefore be complained of as invalid.

A contention was urged in the Petition that employment under the Life Insurance Corporation was an employment in the service of Government which attracted Article 311, but the learned counsel however did not urge this before me in view of the decision of the Bench of this Court in *Narayanaswami Naidu* v. *Krishnamurthi.*[1]

In the view I have taken of these Regulations, it is not necessary for me to express any opinion about a contention urged by the learned Advocate-General who appeared for the Respondent, that even if there was a violation of the Regulation under which the termination of the employment took place, it was not justiciable and would not be subject to the jurisdiction of this Court under Article 226. He likened the employment under the Life Insurance Corporation to that under a private employer and urged that failure to observe the Regulations might enable the employee to seek relief by way of damages in an ordinary civil action but that the latter could not move this Court to set aside the order of termination of employment by the issue of a writ of *certiorari*. I should not be taken to assent to the proposition in such wide terms. In the decision in *Narayanaswami Naidu* v. *Krishnamurthy*[1], this Court has held that a disqualification provided for by the Regulation

1. (1958) 1 M.L.J. 367.

of the Corporation was a disqualification under a law made by Parliament under Article 191 (1) (*e*) of the Constitution. If a Regulation were such a law, and there is no doubt either that the Life Insurance Corporation is a public authority and if there was a violation on the part of such public authority to observe a law, I would be inclined to hold that a violation of the law contained in such a Regulation could be the subject matter of proceedings in this Court under Article 226 of the Constitution and that a suitable remedy could be afforded to the person who had been injuriously affected by a violation of such a statutory provision. But as I have stated earlier, the question does not arise for consideration in this case in the view which I have taken that the termination of the Petitioner's employment was in accordance with the provisions of the Regulations which govern the conditions of his service.

The petition fails and is dismissed and the rule *nisi* discharged. There will be no order as to costs.

P.R.N. ——————— *Petition dismissed. Rule discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

M. Paul Verghese and Co., Ltd .. *Appellant**

v.

G. A. Dhanaliwala .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 6 (1) (b)—Refund of excess rent—How computed—Nature of the claim—Limitation for action.

The period of one year specified in the Proviso to section 6 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, 1949, relating to refund of excess rent, must commence from the date of the original order of the Rent Controller fixing the fair rent and any order of the appellate authority in this regard will date back to the order of the Rent Controller.

A suit for recovery of the excess rent as per the Proviso will also be a proceeding instituted under the Act and is not an independent action under the general law. It is only an enforcement of a right declared under the Act. Both from the language of the Proviso itself and from the express provision in section 20 of the Amending Act (VIII of 1951) the Proviso would apply retrospectively to all cases of claims for refund which were pending on the date of Amending Act and not merely to cases arising after the said date.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Basheer Ahmed Sayeed, dated 17th October, 1955 and passed in C.C.C.A. No. 34 of 1954 preferred against the decree of the City Civil Court, Madras in O.S. No. 799 of 1951.

Albuquerque and *Verghese*, for Appellant.

G. R. Jagadisan and *T. R. Ramachandran*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is a Letters Patent Appeal by the plaintiff-respondent in City Civil Appeal No. 34 of 1954 before Basheer Ahmed Sayeed, J. That appeal was from the judgment and decree of the learned Principal City Civil Judge in a suit (O.S. No. 79 of 1951) instituted by the plaintiff (appellant here) for recovery of a sum of Rs. 3,650-15-10 and costs. The learned Judge (Basheer Ahmed Syeed, J.) remanded the suit to the lower Court for an enquiry into the actual amount that had been paid by the plaintiff to the defendant, and in order to determine what exactly would be the amount that plaintiff would be entitled to claim a refund of excess rent paid under section 6 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act XXV of 1949, as amended upto date.

The facts are simple, and may be stated as follows. The plaintiff (appellant here) was the tenant under the defendant with regard to a portion of a certain premises

* L.P.A. No. 23 of 1956. 29th October, 1959. (7th day of Kartika, 1881—Saka).

in Madras City from 10th March, 1947, on a monthly rental of Rs. 150. The plaintiff had paid an advance of Rs. 450 towards the tenancy. The plaintiff made an application to the Rent Controller, and fair rent was fixed at Rs. 85 per month on and with effect from 27th December, 1949. Both the landlord and the tenant preferred appeals from this decision (H.R.A. Nos. 76 of 1950 and 89 of 1950.) In appeal the fair rent was determined at Rs. 40 per month, and this order was made on 30th August, 1950. The plaintiff claimed a refund of the excess amount collected, as also a sum of Rs. 410 out of the advance. After notices between parties, the suit in the City Civil Court was filed, and the defendant contended that the plaintiff would be entitled to a refund of the excess amount of rent paid only for the period of one year reckoned back from 28th August, 1951, which was the date upon which two petitions filed by the parties for the issue of writ of *certiorari* had been dismissed. The defendant relied on section 6 (1) (*b*) and the Proviso thereto, as amended and introduced by the amending Act VIII of 1951.

It has to be noticed that it was the defendant who instituted the appeal before the learned Judge (Basheer Ahmed Sayeed, J.,) and several contentions appear to have been raised before the learned Judge by respective counsel for the parties. Learned counsel for the plaintiff-respondent before the learned Judge, here appellant, seems to have then contended that the suit for the refund of the excess amount of rent was not a suit or proceeding with reference to Madras Act XXV of 1949 (and the amending Act VIII of 1951, but was a claim in pursuance of a common law right. Consequently, it was contended, that the period of limitation specified in the Proviso to section 6 (1) (*b*) did not apply. The present argument that a suit of this character was not an

"application made, appeal preferred or other proceeding instituted under the said Act and pending at the commencement of this Act"

within the scope of section 20 of Madras VIII of 1951 which was clearly a section intended to give retrospective effect to the Proviso to section 6 (1) (*b*), was not raised by the present appellant, in that form, but it appears to have been touched upon by the learned counsel for the present respondent (appellant before the learned Judge.)

However this might be, the present appellant (plaintiff) puts forward two broad contentions before us. The first is that limitation cannot be applied in this case with reference to the Proviso to section 6 (1) (*b*) of the Act, as introduced by the amending Act VIII of 1951. This is because the Act must ordinarily be considered as prospective in effect, and not restrospective. Section 20 of the Amending Act VIII of 1951 alone invests the Proviso with retrospective effect, but section 20, in its terms, cannot apply to this suit. This suit is not an

"application made, appeal preferred, or other proceeding instituted under the said Act."

This suit is one instituted as an action in common law or under the Code of Civil Procedure, for the enforcement of a right declared by the statute (Act XXV of 1949) no doubt, but not in the form of any proceeding for which either that Act, or the Rules made thereunder provide. The next argument is that the learned Judge was not correct in holding that the date upon which the Writ Petitions were disposed of by this Court (28th August, 1951), should be the date from which limitation is to be reckoned back, for purposes of the refund. On the contrary, it must only be the date upon which the Rent Controller fixed the fair rent, and there is judicial authority for such a view.

We shall deal with both these contentions, but the second contention raises little or no difficulty, and is concluded by authority of this Court. We shall consequently refer to it last. As regards the first contention, it is noteworthy that it was not raised in this form by the appellant before the learned Judge (Basheer Ahmed Sayeed, J.) at all. On the contrary, the point urged, as stated by the learned Judge, was that there was a common law right vested in the plaintiff to claim a refund of any excess paid to the landlord, quite independently of section 6 (1) (*b*) and the Proviso thereto. The learned Judge pointed out that, as between an ordinary tenant and a landlord, the provisions of the Transfer of Property Act would govern their relations (apart from any application of the provisions of the Madras Act XXV of 1949), and that no question of fixation of fair rent would arise. The contract would govern the parties,

and, since the question of a fixation of fair rent would not arise, apart from the contract, the question of a refund would also not arise. This is so clear and irrefutable, that the contention deserves no further consideration. It is at least a matter for doubt whether the appellant is really entitled to raise before us some other contention, which was not before the learned Judge at all, namely, that section 6 (1) (*b*) and the Proviso thereto (introduced by Amending Act VIII of 1951) did not apply to the present facts, since section 20 of the amended Act, which gives retrospective effect, did not apply to a suit of this character, which was not a proceeding instituted under the Act. However, since curiously enough, it is learned counsel for the defendant (appellant there and respondent here) who does appear to have raised the point before the learned Judge, we are now dealing with it. It is sufficient to state that, upon this matter, the learned Judge observed as follows :—

"I do not think authority is needed to support the proposition that suit is a comprehensive term, which would include all proceedings which may arise or which may be taken in respect of a suit. The present suit out of which this appeal has arisen, as I have already observed, is only a proceeding under the Act".

Learned counsel for the plaintiff (appellant here) has relied upon a decision of this Court in *Md. Abdulla and Sons* v. *Dorai Arasu*[1]. That was a Bench decision of Govinda Menon and Ramaswami Gounder, JJ., and certainly it did arise with reference to the Amending Act VIII of 1951, which introduced the Proviso that where before the determination of the fair rent, rent had been paid in excess thereof, the refund or adjustment would be limited to the amount paid in excess for a period of one year immediately before such determination. The learned Judges also referred to section 20 of the Amending Act VIII of 1951, which embodied the retrospective effect of the Proviso, but, upon the facts of the matter before them, the learned Judges came to the conclusion that neither the Proviso nor section 20 could be applied. That was a peculiar case in which the decision as regards the fixation of fair rent became final prior to the Amending Act of 1951, because the appeal actually instituted by the plaintiff in that matter was for a further reduction of the rent, as the plaintiff was not satisfied with the reduction ordered by the Rent Controller. The learned Judges observed :

"In othe words........so far as the reduction of Rs. 5 ordered by the Rent Controller was concerned, his order, dated 16th January, 1951, was final".

The learned Judges then proceeded to apply Article 120 to the claim for refund of excess paid, holding that Article 62 was not applicable. This decision does not help the appellant, because it is totally distinguishable. It does not even consider how far the Proviso had retrospective effect, either standing by itself, or by virtue of section 20 of Amending Act VIII of 1951. The case entirely proceeded on the footing that a final order had been passed as between the parties, determining the fair rent, before the Amended Act came into operation at all. So that section 20 was also rendered inapplicable to the subject-matter of dispute. The situation here is totally different, and we have to consider whether the suit in the present cae is not a proceeding instituted under the Act, which would hence be governed by the retrospective effect given to the Proviso to section 6 (1) (*b*).

It cannot be disputed that, ordinarily speaking, Act of the Legislature should be construed as prospective in effect, and that a retrospective effect should not be spelt out of the language, unless a clear intention, appears to the contrary. Reference might be made here to Maxwell on "The Interpretation of Statutes," 10th Edition, page 213 :—

"It is a fundamental rule of English Law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication".

See also "The Construction of Statutes", Crawford, Chapter XXV, section 277, page 562, and Craies on "Statute Law" (5th Edition) page 358, quoting Lord Hatherley in *Pardo* v. *Bingham*[2]. But needless to say, even the general presumption is not

1. (1956) 1 M.L.J. 184. 2. (1870) L.R. 4 Ch. App. 735, 739, 740.

unqualified, particularly where a statute is curative or remedial in its amendment. Where the intention is clear that the Act should have a retrospective operation, it has to be so construed irrespective of the consequences (Maxwell op-cit., page 222). Crawford states (page 579);

> "............considerations of public policy, public good, and the like may play an important part in exempting curative Acts from the general rule which forbids a construction that gives a statute retroactive effect, even though vested rights may thereby by impaired ".

It is observed in Craies On " Statute Law " at page 369 :

> " Where, however, the necessary intendment of an Act is to affect pending causes of action, the Court will give effect to the intention of the Legislature even though there is no express reference to pending actions ".

A very interesting case up on this aspect is *Hutchinson* v. *Jauncey*[1]. That was a case in which a tenant of a house, within the protection of the Rent Restriction Acts, sub-let two rooms. The sub-tenant subsequently bought the house, subject to the tenancy, and in his capacity as landlord attempted to eject the tenant, but on June 2, 1949, the Landlord and Tenant (Rent Control) Act 1949, came into force, by which the protection was furnished. Upon a true construction of section 10, the Court held that the relevant provision of the Act applied to pending actions, and that the tenancy was protected with regard to the law as it existed on the date of hearing. It is significant that the principle or rule in *Hutchinson* v. *Jauncey*[1], was also applied in *Jonsa* v. *Rosenberg*[2].

If, for a memonet, we look at section 6 (1) (*b*) as it stood in Madras Act XXV of 1949 or Madras Act XV of 1946 (this is section 6 (*c*)), we find that the rule merely states that the sum paid in excess of the fair rent shall be refunded to the person by whom it was paid or, at the option of such person, otherwise adjusted. The failure to specify any period of limitation was clearly a lacuna, and it could not have been the intention of the Legislature that such refund was claimable irrespective of any period of limitation. We must remember that, particularly with regard to ancient tenancies in Madras City which do exist, the fixation of fair rent might give rise to a claim for refund going back for decades. It was apparently in view of this difficulty, that, in *Md. Abdulla and Sons* v. *Dorai Arasu*[3], the learned Judges applied Article 120 upon the facts of that case, where the Proviso to section 20 of Amending Act VIII of 1951 had no application, because the order had become final before the enactment, and no proceeding with regard to that declaration of rights was then pending. We have no doubt in concluding that, judged from the terms of the Proviso itself, and even apart from section 20 of the amended Act, the intendment that the Proviso should be retrospectively applied to all cases of claims for refund which were pending upon that date, and not merely to causes which might arise thereafter, can be spelt out of the language, the context, and the purpose of the Proviso. Such a view is reinforced by the explicit provision of section 20 of the Amending Act. The argument that the present suit is not a proceeding instituted under the said Act, within the meaning of section 20, overlooks the vital consideration that the purpose of the Proviso and of the Amending Act itself should be borne in mind as a rule of construction, and that, hence, the words

> "application made, appeal preferred or other proceeding instituted under the said Act"

should be liberally construed. That would certainly include a suit of this character, for this suit is for the enforcement of a right declared under the Act, and is not an independent action under the common law.

With reference to the second point, it may be very briefly disposed of, since it is concluded by the authority of the Bench decision of the learned Chief Justice and Ganapatia Pillai, J., in *Patel* v. *Ponnayya Nadar*[4]. This enunciates that, in applying the Proviso to section 6 (1) (*b*) intoduced by the Amending Act, a period of one year in such cases must count from the date of the original order of the Rent Controller fixing the fair rent. This is because the determination of fair rent by the appellate

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1. L.R. (1950) 1 K.B. 575.
2. L.R. (1950) 2 K.B. 52.
3. (1956) 1 M.L.J. 184.
4. (1959) 1 M.L.J. 32.

authority will date back to the order of the Rent Controller upon the reasoning that, in effect, the order of the appellate authority is the order which the Rent Controller ought to have passed. Hence, the limitation will be a period of one year reckoned back from the date of the order of fixation of fair rent by the Rent Controller; but there can be no other enlargement of this claim. With this modification in the directions of the learned Judge the appeal is dismissed. There will be no order as to costs. Court-fee paid in the appeal will be refunded.

R.M. ——— *Appeal dismissed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Bagyalakshmi Ammal and others .. *Petitioners**

v.

Srinivasa Reddiar .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 11, *rule* 20—*Discovery and inspection—Scope of the right.*

The mere fact that certain documents have been produced and filed in a suit by a party does not by itself give the other side the right to inspect the same as a matter of course, when the party producing the same objects to its being inspected before the determination of a particular issue or question. That the documents are relevant for the purpose of the suit is not by itself a sufficient reason for ordering premature inspection.

Where the decision in any suit depends on the finidng on a preliminary issue which goes into the very root of the plaintiff's case such as whether the suit temple is a public temple or not, or whether the plaintiff is a partner in the defendant's firm, a Court cannot order inspection of the defendant's documents before the determination of such an issue. In cases where the right to discovery in any form depends on the determination of any question or issue in dispute in the cause or matter or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery should be deferred till after the issue or question has been determined.

British India Steam Navigation Co. v. *Secretary of State for India*, (1910) I.L.R. 38 Cal. 230, followed

Case-law reviewed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge (2nd Additional) of Madurai, dated 22nd November, 1955 and made in I.A. No. 1731 of 1955 in O.S. No. 63 of 1954.

T. Venkatadri and *G. K. Raman*, for Petitioners.

M. Natesan, for Respondent.

The Court delivering the following

JUDGMENT.—This Civil Revision Petition arises out of the order of the learned Second Additional Subordinate Judge of Mathurai in an application made by the plaintiff, under Order 11, rule 18 (2) and section 151 of the Civil Procedure Code, and also rules 63 and 64 of the Civil Rules of Practice.

The petition was filed by the plaintiff for inspection of the documents and accounts filed by the respondent in Court before the trial of the suit began. The suit in respect of which this application by the plaintiff was made was one for setting aside the order of the Deputy Commissioner of the Hindu Religious and Charitable Endowments Board, and to declare that the plaint temple was a public temple. The suit was opposed by the 4th defendant, among others, on the ground that the temple in question was a private temple. After the written statement was filed by the defendants, including the 4th defendant, who is the petitioner in this revision, a reply statement was also filed by the plaintiff. In the written statement of the 4th defendant, the petitioner, it was pleaded *inter alia* that the plaintiff was not a worshipper of the suit temple; that he was not connected in any manner with its affairs and had no right of worship in the temple and, therefore, was not entitled to maintain the suit, or to

* C.R.P. No. 1255 of 1955. 16th December, 1955.

claim any relief. It was also contended that the plaintiff was a resident of another village 9 miles away from the village where the suit temple was situated, and that the suit itself had been filed out of spite and malice due to bitter enmity between the plaintiff and the 4th defendant. It was further pleaded by the 4th defendant, that the suit was barred by section 103 of the Madras Act XIX of 1951, and was not maintainable in view of the prior decisions of the Hindu Religious and Charitable Endowments Board in O.S. No. 432 of 1950, declaring that the suit temple was a private temple. The 4th defendant also contended that the temple was never dedicated to the public and that the public did not worship there, and that it was intended for the members of the defendant's family purely as a private temple. A further plea was that the temple had been built as a private temple, and mentioned in the deed of partition in the family, dated 7th July, 1902, that the public did not contribute anything either in the shape of money or labour for the construction of the temple, and that on the other hand it was constructed with the funds of the family. It is not necessary to go into all the very elaborate allegations and the pleas set up in the written statement of the 4th defendant, which runs upto 15 paragraphs covering about 11 typed foolscap pages.

After the reply statement was filed by the plaintiff, issues were settled on 29th November, 1954. Two weeks time was given for filing of documents, and 12th January, 1955, was appointed for the trial of the suit.

In the meanwhile, the 4th defendant filed a petition supported by an affidavit on 13th December, 1954, in which it was prayed that the Court may be pleased to pass an order directing that the documents filed by the defendants in Court with a list may be kept in a box sealed with the seal of the Court in the interests of justice. The affidavits in support of the said petition stated that the defendants were producing their documents in the Court that day, and among those documents, documents Nos. 14 to 19 were account-books maintained in respect of the receipts, and expenses relating to the suit temple, maintained by the previous trustees, and those maintained by the kariasthan of the 4th defendant during the period of his trusteeship of the suit temple. It further stated that the account-books were very material documents, in support of the defendant's case, and if perchance those are damaged and missed, the defendants will be greatly prejudiced in their defence. The affidavit went on to say further, that the books were few in number, and in the interests of justice, necessary safeguards have to be made to preserve them, and this could be done by having them sealed with the seal of the Court and kept in a box. This petition was accordingly ordered. Nearly a year after, that is, on 17th November, 1955, the plaintiff filed an application, out of which this revision has arisen, under Order 11, rule 18 (2) and section 151 of the Civil Procedure Code, and rules 63 and 64 of the Civil Rules of Practice for permission to inspect the documents produced by the 4th defendant into Court.

The affidavit in support of this application filed by the plaintiff *inter alia* stated that the 4th defendant had filed a list of documents, among which they had produced some account-books, that is, documents Nos. 14, 15, 17, and 18, which must have been in their possession and power, that they had filed the account-books relating to the suit temple on which they intended to rely, but that the plaintiff understood that they had been put in a sealed box and prayed that he must be given permission to inspect the accounts produced in Court "for purposes of cross-examination and to understand the genuineness and purport of the same". It further stated that to have an inspection, no reasonable objection could be raised by the respondents, and that the plaintiff had a right to have an inspection of the documents shown in the list produced by the respondents. The deponent further stated in the affidavit, that he had no knowledge till then, that the documents had been kept in a sealed box, and that he came to know only on 16th November, 1955, the suit itself was posted to the 25th instant, and therefore, desired that the inspection should be given of all the documents filed by the respondents, inclusive of the account-books referred to above, before the Sarishtadar or such other officer as the Court may deem fit to order.

This petition was opposed by the 4th defendant, and his kariasthan filed a counter-affidavit contending *inter alia* that the application was unsustainable in law, and also on merits, that the mere production of the documents by one party did not entitle the other, as a matter of right, to have an inspection of the same, that unless such a right was established, the other party could not inspect the documents; that the question whether the defendants had to rely on the documents produced, will certainly depend upon the evidence adduced by the plaintiff, and the proper time for inspection, if such can be had, would be at the time when the trial commenced and evidence was recorded, that the plaintiff before establishing his case that the suit temple was a public temple, the onus of which lay heavily upon the plaintiff, cannot be allowed before leading evidence to have a roving inspection of the documents filed by the defendants, and that the application was *mala fide* and premature.

The learned Second Additional Subordinate Judge of Mathurai, who heard the petition, accepted the claim of the plaintiff, and directed him to have an inspection of the documents mentioned in his petition, before the chief ministerial officer of the Court in the presence of the respondents' advocate, if the latter chose to be present. Aggrieved by this order, the defendants have preferred this revision petition.

It is not in controversy that the first and the foremost issue to be decided in the suit is whether the suit temple is a public one. It is the claim of the plaintiff that it is a public temple, while the previous order of the Religious Endowments Board has held it to be a private temple. It is beyond question, therefore, that the onus to prove this issue was heavily upon the plaintiff. It is the contention of the learned counsel, Mr. Venkatadri, appearing on behalf of the petitioners, that the plaintiff will not be entitled to have an inspection of the documents produced by the defendants until and unless the plaintiff adduced evidence to prove his claim, that the suit temple was a public one, and until the point was determined by the Court. No doubt the application for inspection has been taken out under Order 11, rule 18 (2), but the real rule, it is urged by the learned counsel for the petitioners, that governs the case is rule 20, and not rule 18 (2). Rule 20 is to the following effect :

> " Where the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection '.

It is urged by the learned counsel tor the petitioners, that the 4th defendant having objected to the discovery or inspection of the documents filed by him in Court, the Court ought to have held that the discovery or inspection depended on the determination of the issue, namely, whether the suit temple was a public one or a private one, and should have directed that that issue should be determined before any right to discovery or inspection could be ordered. The question of discovery or inspection should have been reserved until such time as the question in dispute was determined by the Court. I am of the opinion, that there is force in the contention of the learned counsel for the petitioner and in my view, the mere fact that the documents had been produced and filed in Court will not entitle the plaintiff as a matter of routine to obtain discovery or inspection of the same, when once objection has been taken by the petitioners. The learned Judge has observed that the fact that the defendants had produced the documents in support of their case and the affidavit filed in support of the petition, make him think that the documents are relevant for the purpose of the suit. In my opinion, this cannot be a sufficient ground for ordering inspection. That the documents are relevant for the purpose of the suit, cannot by itself, be a sufficient reason to order a premature inspection or discovery before the suit is actually taken up for trial.

The learned Subordinate Judge has further proceeded to observe in his order, that if the inspection is not allowed before the trial, it would certainly put the plaintiff at some disadvantage and would perhaps protract the course of the trial. Therefore, in such circumstances, he thought that it was a fit case, where an inspection of the respondents' documents should be allowed, as it would enable the petitioner to conduct the trial speedily and avoid unnecessary delay in the course of the trial. It is

difficult to agree with the reasoning of the learned Subordinate Judge. The learned Subordinate Judge has not considered the real objections taken by the 4th defendant-petitioner, to the claim of the plaintiff-respondent, for inspection of the documents. Nor has the Subordinate Judge taken into account the allegations contained in the affidavit filed by the plaintiff, in support of his claim for inspection of the documents in question. Except the allegation that the account-books relate to the suit temple, and that the defendants seek to rely upon the same, there is no allegation in the affidavit of the plaintiff, in support of his petition for inspection that they are even relevant for the purpose of the suit. The plaintiff merely states that he understands that the documents have been put in a sealed box, and that he must be given permission to inspect the accounts produced in Court, not because he seeks to rely on them, as material to his case, nor because those document would support his contention that the temple is a public one. On the other hand the express object in claiming inspection has been stated to be for " the purpose of cross-examination and to understand the genuineness and purport of the same" and that the plaintiff has a right of inspection, because the documents have been filed and shown in the list filed by the respondent. Such an allegation could hardly be considered to be a fit or proper ground for claiming inspection of the documents filed by the petitioner, much less for ordering an inspection of the same in compliance with the demand of the plaintiff. The Subordinate Judge has completely ignored the allegations referred to above in the affidavit filed in support of the petition by the plaintiff. He has simply been carried away by the general impression that simply because the documents have come into Court, from the custody of the defendants, the plaintiff will be entitled to a premature discovery or inspection, irrespective of the fact, whether the documents are material to the case of the plaintiff, or that the plaintiff was relying upon them, in support of his case, or that an inspection was necessary as the point that was to be proved by the plaintiff depended upon the documents produced by the defendants. It appears to me to be an unheard of ground to claim inspection when the plaintiff states that they are required for cross-examination and to understand the genuineness and purport of the same. No defendant can be compelled to produce any document or to give inspection of the same for the purpose of facilitating cross-examination, or for enabling the plaintiff to understand the genuineness or purport of the documents relied upon by the defendants for proving his case. It will lead to strange results if such grounds are to be accepted by Courts in ordering discovery or inspection, especially when these grounds are not the ones contemplated under the rules, which enable Courts to direct discovery or inspection of documents.

The learned counsel for the respondent has, however, contended that no privilege has been claimed by the petitioner in his counter-affidavit in order to deny inspection being given to the plaintiff of the defendants' documents. Though in terms a privilege has not been claimed, still the general tenor and purpose of the affidavit filed at the time when the documents were produced in Court and also the one filed objecting to the inspection being ordered is to the effect that the documents are relevant to the case of the defendants, that he seeks to rely upon them, and that inspection could not be given before the plaintiff is called upon to establish his case, which is comprised in the first issue in the suit, namely, that the temple is a public temple.

Wallace, J., in *Ramachari* v. *Krishnamachari*[1], has discussed the principles governing the premature discovery or inspection by plaintiff of documents filed by the defendant in a suit. In the course of the discussion the learned Judge has observed as follows :—

" I cannot assent to the proposition that when a party has produced in Court under Order 11, rule 14, documents in his possession but has urged that inspection should not be allowed before hearing his objection the Court has a right to ignore that protest and the other party has a legal right to inspect all documents relating to all issues and to all stages of the trial of the suit, *i.e.*, that the mere production by one party gives an immediate and indefeasible right of inspection to the other. I do not read Order 11, rule 14, as justifying any such conclusion. As the Court was proceeding according to the usual practice in the mofussil, to allow inspection in Court under Order 11, rule 14 and not under

1. (1925) 47 M.L.J. 460.

rule 15, I hold it was bound to consider first defendant's objections to inspection and especially bound to consider whether plaintiff was entitled to inspect all these documents *at that stage of the case*, viz., before trial had begun. As pointed out above, the first point to be decided in the case is whether plaintiff is or was a partner in first defendant's trade. Until that is decided in plaintiff's favour, obviously plaintiff has no right whatever to be allowed to inspect the trade accounts, apart from those which bear on the question of partnership. The Court has no right to assume that plaintiff is a partner, and, if it must hold that he is not unless and until he proves that he is clearly, it is unjustified in law in allowing a stranger, merely on the allegation that he is a partner, permission to inspect all the trade accounts of first defendant. The conduct of business would be impossible under such conditions and the Court has clearly lent itself to a course which is wholly opposed to public policy and it is therefore necessary for this Court to interfere ".

This authority has been referred to and relied upon by the learned counsel on both sides before me, and it has also been considered by the learned Subordinate Judge, before whom the petitioner, the 4th defendant, cited the decision in support of his contention. In my view, the learned Subordinate Judge does not appear to have understood the real scope of the decision of Wallace, J., cited before him. Though this decision arose under Order 11, rule 14, the principles discussed in that decision would seem to apply with greater force to an application that is made under order 11, rule 18, or under rule 20 thereof. This decision does not lend any support to the contention of the learned counsel for the respondent that simply because the documents have been filed and are relevant to the defendants' case, inspection of the same should be given to the plaintiff as a matter of routine. The learned Judge, while considering the scope of the said decision, has observed that he considered the scope and merit of the suit and was of the opinion that an inspection of the documents produced by the petitioner would be very helpful and necessary for the better and speedy conduct of the trial. But in this observation, he has not appreciated the position that the plaintiff was asking for a discovery before the actual trial had begun. It is one thing to say that the inspection of the documents may be helpful and necessary for the fair and speedy conduct of the trial by the Court, and it is quite another thing to say that the petitioner should be given premature inspection of the documents, in respect of which he does not make any allegation that they are relevant for his case, or that he depends upon them for proving the point, which he seeks to establish in the first instance.

The learned Subordinate Judge has also referred to a decision in *Gobardhan Das* v. *Mt. Jai Devi*[1]. This decision does not in my view apply to the facts that arise for determination in the present case. In *Gobardhan Das* v. *Jai Devi*[1], the question of the necessity for an affidavit by the applicant to satisfy the Court that the document was relevant to the case was discussed, and it was held that where the Court, was satisfied as to the relevancy of the document it was not necessary that there should be an affidavit, and that the want of an affidavit could not invalidate the order for production for inspection under Order 11, rule 18, of the Civil Procedure Code. The point, however, remains in the present case, that there is no affidavit filed by the plaintiff that the documents, in question, which were not filed along with the written statement had any relevancy to the case. It further held that in case of a document mentioned in the plaint or written statement or affidavit of discovery, the relevancy is admitted while in the other case the relevancy has to be proved. In this decision no question as to any objection by the party which produced the document arose for decision by the Court, before an order for inspection.

In *British India Steam Navigation Co.* v. *Secretary of State for India*[2], a Bench of the Calcutta High Court has held that there was no substance in the contention of the claimants that an order for discovery could not be made in a case under the Land Acquisition Act.

" Section 53 makes the provisions of the Civil Procedure Code, save in so far as they may be inconsistent with anything contained in the Act, applicable to all proceedings before the Court of the Land Acquisition Judge ".

The Bench further observed:

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1. A.I.R. 1931 All. 221 : (1930) I.L.R. 53 All. 442.

2. (1910) I.L.R. 38 Cal. 230.

"It is well settled that in cases where the right to discovery in any form depends upon the determination of any issue or question in dispute in the cause or matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue or question has been determined."

This case has been relied upon by the learned counsel for the petitioner and reference has been made to the illustrations given by the learned Judges in the said decision in applying the principle enunciated by them. I think the principles laid down in this case apply to the facts of the present case.

In *Ramachandrayya* v. *Buchayya*[1], Venkatasubba Rao J., has reviewed the English decisions, which govern the claim for premature discovery, and has observed as follows :

" If two conditions are satisfied, discovery may precede particulars first where the information required is necessarily within the opponent's knowledge ; secondly the Court is satisfied that no unfair attempt to fish out a case is being made. When these conditions are satisfied, discovery may precede particulars even where the object of the action is to reopen settled accounts.".

In the case before me it cannot be said that these two conditions have been satisfied. On the other hand, the request of the plaintiff for inspection in the light of the allegation in the affidavit filed in support of the petition appears to be only an unfair attempt to fish out a case by means of asking for inspection of the documents filed by the defendants. The learned counsel for the petitioner has invited my attention also to *Great Western Colliery Company* v. *Tucker*[2], *Bewicke* v. *Graham*[3], and *Attorney-General* v. *North Metropolitan Tramways Company*[4], and also to passages occurring in Seaton's Judgments and Orders and Halsbury's Laws of England. It is unnecessary for me to deal with these citations at any length for the simple reason that most of these authorities have already been dealt with in the cases already relied upon by the learned counsel for the petitioner. Learned counsel for the petitioner has also invited my attention to a decision in *Ramanatha Ayyar* v. *Board of Commissioners of H.R.E.*[5], to which I myself was a party in support of his contention that it is not necessary that there should be a discovery of documents in order to establish that a temple is a public temple.

On behalf of the respondent, the learned counsel has referred to at great length to Daniel's Chancery Practice, Vol. 1, 1934 Edition, and particularly to those passages that occur at pages 568, 605, 613, 615, 629, and 630. I do not think that any of these passages help the respondent in his present contention. They lay down the general proposition that production of documents could be ordered, if the documents are relied upon by the party asking for inspection, that they prove his case, and not that inspection could be ordered when actually an issue or point in dispute has to be first established by the party asking for such inspection. I do not think that in the view I have taken of the case, I need burden this judgment with any elaborate reference to the several passages mentioned above. Suffice it for me to refer only to one passage occurring at page 630 to the following effect ;

" The result of the cases on this subject has been thus stated : If it be, with distinctness and positiveness, stated in an answer that a document forms or supports the defendant's title, and is intended to be, or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature.

But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend the document is not protected nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness. It would seem, however, that under the present practice the circumstance that the document may contain matter impeaching the defence is not regarded as material, at least in an ejectment action."

A further passage occurring at page 631 may also be usefully referred to.

1. (1934) 68 M.L.J. 241.
2. L.R. 9 Ch. App. Cases 376.
3. (1881) L.R. 7 Q.B.D. 400.
4. L.R. 9 Ch. D. 70.
5. (1954) 1 M.L.J. 239.

" Under the practice of the Court of Chancery a mere statement in the answer, of a document which the party was not bound to produce, or a mere reference to a document relating exclusively to the defendant's title, did not entitle the applicant to its production."

In this case there is also no allegation in the affidavit that the documents produced by the defendants relate to the common case of both the parties. On the other hand, the claim of the defendant, as I understand, is that they relate exclusively to his case, and not that they relate to the case of both the parties. Cases no doubt have held that if documents produced by one party relate to the case of both the parties then the party producing them cannot claim exemption from inspection. Respondent's counsel has also invited my attention to passages in Halsbury's Laws of England, Vol. X, paragraph 454, 460, 461, 406 and 429 in support of his contention, that he was entitled to inspection of documents on the principles enunciated in the said paragraphs. I do not think that I can agree with him. In my view the general propositions laid down in those paragraphs are unexceptionable and the conditions which have to be satisfied, while applying the principles enunciated therein, do not obtain in the present case.

Learned counsel has also relied upon *Ahmedbhoy Hubbihoy* v. *Vulleebhoy Cassumbhoy*[1], and referred to me the passage occurring at page 577 in the said judgment. I do not think that that passage is of any assistance to the learned counsel. On the other hand they seem to help the case of the petitioner.

Parker v. *Wells*[2], also relied upon by the learned counsel for the respondent does not apply to the facts of the present case, and is not of any assistance to the respondent. The facts in *Leith* v. *Abbott*[3], are not *ad idem* to the facts in the present revision before me. If anything the observations contained in that case help the point urged on behalf of the petitioners.

Learned counsel for the respondent has invited my attention to *Whyte* v. *Ahrens*[4] and *Lanolin Fabrik* v. *Richardson & Company Benno Jaffe & Darmstaedter*[5], and *Hari Singh* v. *Ramchand*[6], in further support of his contention. I do not think that these authorities advance the case of the respondent any further. They deal only with propositions of a general character, which do not directly arise in the present case

Therefore, on a consideration of the facts and circumstaces that arise in this case, I am of the opinion that the order of the learned Subordinate Judge is one that is not sustainable, and it is accordingly set aside, and the revision petition is allowed with costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Shanmugha Oil Mill, Erode, by Partner, V. Varadappa Chettiar .. *Petitioner**.

v.

The Coimbatore Market Committee, by Secretary and another .. *Respondents.*

Madras Commercial Crops Markets Act (XX of 1933), section 11 (1) as amended by Act XXXIII of 1955—Power of market committee to levy a cess by way of sales-tax—Invalid as amounting to excessive delegation of legislative power—Amending Act XXXIII of 1955—If colourable piece of legislation—Whether offends Article 14 of the Constitution—Assessment—Illegal levy inseparable—Whole assessment bad—Market Committee—Is a local authority as defined by section 3 (17) of the Madras General Clauses Act—Being a levy for a local fund by a local authority it cannot go into the Consolidated Fund under Article 266 of the Constitution—Cess and fee—Difference.

There was a maximum fee fixed in regard to rate of levy under the rules before the 1955 amendment of the Madras Commercial Crops Markets Act but under the amended section 11 (1) of the Act there was no maximum or minimum fixed. There is no indication in the enactment by way of gui-

1. (1882) I.L.R. 6 Bom. 572.
2. (1881) L.R. 18 Ch. D. 477.
3. (1886) L.R. 31 Ch. D. 374.
4. 54 L.J. Ch. 145.
5. 62 L.J. 710.
6. (1911) 12 Ind. Cases 506.

* W.P. No. 605 of 1957. 24th April, 1959.

dance to the assessing authority. The existence of a mere power to repeal would not be sufficient to say that the legislature has the control over the assessment. Section 11 (1) of the Act no doubt declares the liability and provides the machinery but fixing the rate of tax has been completely delegated to the executive without laying down the principles or the basis. Uncontrolled power is vested in the executive to fix such rate as it pleases. The provisions of the section amounted to excessive delegation of legislative power and are therefore invalid.

The delegation of the legislative power should be a case of exercising an authority under the law and not one to make the law.

Where it will not be possible to dissociate the portion of the fee collected for the purpose of services rendered with the portion which was outside the scope of the purposes, that is that could be achieved only by collecting the tax the entire assessment is bad.

In *Kutti Koya* v. *State of Madras*, (1954) 1 M.L.J. 117, it was held that the fee sought to be levied under section 11 (1) of the Act was really in the nature of a tax though mistakenly termed a fee. The amendment of section 11 by Act XXXIII of 1955, substituted the word 'cess by way of sales-tax' in the place of the word 'fee'. Act XXXIII of 1955 has the effect of levying an additional sales-tax in regard to commercial crops and Article 246 (3) read with Item 54 of List II of the Seventh Schedule of the Constitution confers such a power on the State Legislature. This cannot be termed a colourable legislation.

The market committee under the Act is a local authority as defined in section 3 (17) of the Madras General Clauses Act. The market committee fund being a fund to be expended only in connection with the purposes of the market would be a local fund. Article 277 of the Constitution saves all taxes, duties, cesses or fees levied before the commencement of the Constitution by the State Legislature. Both before and after the Constitution the Provincial or State Legislature had or has power to enact measures to enable a local authority to raise funds for their activities by taxation. By reason of the fact that under the statute itself the funds collected have been allocated to the local authority it could not be deemed to be one received by the State and therefore such taxes need not and could not go into the Consolidated Fund of the State under Article 266 of the Constitution. It cannot, therefore, be held that the levy under section 11 (1) of the Act would be invalid on that ground.

The provisions of section 11 (1) do not offend the equal protection of law guaranteed by Article, 14 of the Constitution.

According to its import the word 'cess' is only a tax and not a mere fee. It is, therefore, not necessary for the purpose of levy of cess that there should be *quid pro quo* between the service actually rendered and the amount of tax levied.

Case-law discussed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 1st Respondent herein to forbear from enforcing its notice S. No. 610. dated 11th July, 1957, calling upon the petitioner to pay cess for the groundnuts purchased from 23rd November, 1955, to 30th June, 1957, under section 11 (1) of the Madras Commercial Crops Markets Act, 1933, Rule 28 (1) of the Madras Commercial Crops Market Rules, 1948 and, by-law 23 of the Coimbatore Market Committee by-laws and grant costs of this petition.

M. K. Nambiyar and *K. K. Venugopal*, for Petitioner.

V. V. Raghavan, for the 1st Respondent.

The Advocate-General (*V. K. Thiruvenkatachari*) and The Additional Government Pleader (*K. Veerasami*) on behalf of the 2nd Respondent.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution for the issue of a writ of *mandamus*, directing the first respondent to forbear from enforcing its notice S. No. 610, dated 11th July, 1957, calling upon the petitioner to pay cess for the groundnuts purchased from 23rd November, 1955, to 30th June, 1957, under section 11 (1) of the Madras, Commercial Crops Markets Act, 1933, Rule 28 (1) of the Madras Commercial Crops Markets Rules, 1948 and by-law 23 of the Coimbatore Market Committee by-laws.

The petitioner is a merchant carrying on business at Erode in the name of the Shanmugha Oil Mill engaged in the purchase and sale of groundnuts. He has taken a licence for dealing in groundnuts under section 5 (1) and 5 (3) of the Madras Commercial Crops Markets Act (Madras Act XX of 1933) which I shall refer hereafter as the Act. The first respondent is the Coimbatore Market Committee constitu-

ted under section 4-A of the Act. Coimbatore District is a notified area under the Act in respect of groundnuts and certain other commercial crops, such as cotton, tobacco and turmeric. As the petitioner's business place is situated wihin the notified area, the Market Committee of Coimbatore would be entitled to collect certain fees and cesses for which provision has been made under the Act, the Rules and the by-laws. Under section 11 (1) of the Act the petitioner would be bound to pay a cess, as provided for therein. On 11th July, 1957, the 1st Respondent issued a notice, calling upon the petitioner to render accounts for the purchase of groundnut between 23rd November, 1955 and 30th June, 1957 and to pay cess on the quantity purchased in accordance with the rates fixed by the Rules and Regulations aforesaid. The case for the petitioner is that the demand for the cess could not be held to be under authority of law, and that, therefore, a direction of this Court is necessary to prohibit the 1st Respondent from levying or collecting the cess.

The Act was passed on the 25th July, 1933, with a view to provide satisfactory conditions for the growers of commercial crops to sell their produce to the best advantage. It was intended to regulate buying and selling of commercial crops by providing suitable and regulated markets, eliminating the middlemen and reducing the scope of exploitation of the producers by financiers. The historical background and the purport of the legislation have been considered in *Kutti Koya* v. *State of Madras*[1], and in *Arunachala Nadar* v. *The State of Madras*[2]. Except in regard to one provision of the Act the legislation has been held to be valid. Under the Act a machinery is set up for controlling and regulating the sale of commercial crops. The State Government is given power to notify an area in respect of commercial crops and constitute a Market Committee for that area. Provisions are made for the constitution, supersession, etc, of the Market Committee. The State Government is empowered to make rules for working the Act and the Market Committee could make its own by-laws for regulation of trade. Establishment of a market for enabling the meeting of buyers and sellers and provision for its building, amenities are provided for. To facilitate the object of the enactment being fulfilled certain restrictions have been imposed on traders in the notified area. In view of the contentions raised in this petition, it is necessary to consider briefly the provisions of the Act in its original form as enacted in 1933 and the change effected by the Amending Act, XXXIII of 1955.

Section 2 (1) (*a*) of the Act defines ' commercial crop ' to mean

"cotton, groundnut or tobacco and includes any other crop or product notified by the State Government in the Fort St. George Gazette as a commercial crop for the purposes of the Act".

Section 3 enables the State Government by notification in the Official Gazette to declare their intention of exercising control over the purchase and sale of such commercial crops or crop and in such area as may be specified in the notification. The notification would call for any objections or suggestions which may be offered within a period to be specified in the notification. After the expiry of the period specified in the notification under section 3 and after considering such objections and suggestions as may be received, the State Government may declare the area specified in the notification or any portion thereof to be notified area for the purposes of the Act in respect of the commercial crop or crops specified in the notification. Section 4-A authorises the State Governent to establish a Market Committee for every notified area and it is for the Market Committee to enforce the provisions of the Act and Rules and by-laws in such notified area. It is also the duty of the Market Committee to establish such number of markets and provide for such facilities as the State Government may from time to time direct for the purchase and sale of the commercial crop or crops concerned. Section 11 (1) authorised the Market Committee, subject to such rules as may be made in this behalf, to levy a fee on the notified commercial crop or crops bought and sold in the notified area at such rates as the State Government may determine, and till such rates are determined the rates mentioned in the specified schedule to the Act are to be adopted.

1. (1954) 1 M.L.J. 117.
2. (1959) 1 M.L.J. (S.C.) 133 : (1959) 1 An. W.R. (S.C.). 133: (1959) S.C.J. 297: A.I. 1959 S.C. 300.

Section 12 enacts that all moneys received by a Market Committee shall be paid into a fund to be called the 'Market Committee Fund' that all expenditure incurred by the Market Committee under or for purposes of the Act shall be defrayed out of the said fund, and that any surplus remaining after such expenditure has been met shall be invested in such manner as may be prescribed by rules. The other provisions in the section enable the Market Committee to pay the staff employed by the State Government for giving effect to the provisions of the Act. Section 13 prescribes the purposes for which the Market Committee fund can be expended. They are (i) the acquisition of a site or sites for the market, (ii) the maintenance and improvement of the market (iii) the construction and repair of buildings which are necessary for the purposes of such market and for the health, convenience and safety of the persons using it, (iv) the provision and maintenance of standard weights and measures, (v) the pay, pensions, leave allowances, gratuities, compassionate allowances and contribution towards leave, etc., for the employees, (vi) the expenses of and incidental to elections, etc. Section 18 confers on the State Government power to make Rules for carrying out all or any of the purposes of the Act. Section 18 enables the Market Committee with the previous sanction of the Director of Agriculture, Madras, and subject to any rules made by the State Government under section 18, to make by-laws for the regulation of the business and the conditions of trading therein. In pursuance of the rule-making power, the State Government framed rules, styled as the Madras Commercial Crops Market Rules, 1948. Rule 28 relates to levy of fees. That rule prescribes the maximum fee that can be levied on commercial crops under section 11 (1) of the Act. The Coimbatore Market Committee have also framed by-laws for regulation and conduct of the business. Rule 23 prescribes the actual fees that can be levied on all quanities of goods bought and sold within the notified area.

The validity of the Act, Rules and by-laws framed thereunder were the subject matter of challenge in *Kutti Koya* v. *State of Madras*[1]. This Court, by its judgment upheld the validity of the Act except in regard to three matters. The learned Judges held that the provision in section 5 of the Act, which prescribed that a person could not sell within the notified area except under a licence and in accordance with the conditions therein granted to him by the Collector, was a valid provision and could not be held to be unreasonable restriction in carrying on the business of an individual. But they held that the provisions of section 5 (4) (*a*) which vested in the Collector an unlimited and uncontrolled power to grant or refuse to grant a licence, was invalid though a regulation of trade by the grant of licences to all who apply, pay the fee and obey the conditions imposed therein was valid. They struck down rule 36 which required buyers and sellers to register their names with the Market Committee and execute agreements in such form as the committee may prescribe as invalid in so far as it prohibited persons whose names had not been registered as buyers and sellers from carrying on the business in the notified area. They also held that the provisions of the Act under sections 11 and 11-A and rule 26 (1) and (3) providing for the levy of fees on the notified commercial crops bought and sold in the notified area at such rates as it might determine, were not repugnant to Article 286 (2) of the Constitution, but that the amounts collected were taxes and not mere licence fees, being in the nature of a sales tax. The levy under rule 28 (3) and section 11-A being for service rendered, it was held to be valid. In so far as the decision upheld the validity of the enactment, an appeal was filed to the Supreme Court. The judgment of the Supreme Court was reported in *Arunachala Nadar* v. *State of Madras*[2], where it was held that the impugned provisions of the Act constituted only reasonable restrictions on the citizens' right to do business, and that therefore, they were valid.

After the decision in *Kutti Koya* v. *State of Madras*[1], the State Government passed Act XXXIII of 1955 to amend the Act in certain particulars. I shall refer to the sections which are material for the purpose of the present case. Section 11 (1) was repealed and re-enacted thus:—

1. (1954) 1 M.L.J. 117.
2. (1959) 1 M.L.J. (S.C.) 133 : (1959) 1 An. W.R. (S.C.) 133 : (1959) S.C.J. 297 : A.I.R. 1959 S.C. 300.

"Notwithstanding anything contained in the Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) the Market Committee shall, subject to such rules as may be made in this behalf, levy a cess by way of sales-tax on any commercial crop bought and sold in the notified area at such rates as the State Government may, by notification, determine.

Explanation.—For the purpose of this sub-setion all commercial crops leaving a notified area shall, unless the contrary is proved, be presumed to be bought and sold within such area."

In the other sub-sections the word " cess ' was substituted for the word ' fee '. Rule 18 (2) (vi) relates to the maximum annual fees which may be levied by the Market Committee in respect of licence granted under section 5. The words ' and on the commercial crop or crops bought and sold in the notified area' are omitted with the result a rule can be framed only in regard to fee which is leviable under section 5 and not under section 11. Rule 28 which enables fixation of maximum fee on the commercial crop or crops still remains with the alteration of the term, ' fee ' into 'cess'. There is also similar alteration in rule 9 where the word ' fee' in clause (1) was converted into ' cess '. It may, however, be noticed that under section 11 (1), as amended, the Market Committee is authorised to levy such fees by way of sales-tax at such rate as the State Government may determine. After the amendment of the Act in 1955, the Market Commitee also amended its by-law 23 by substituing the word ' cess ' for the word ' fee '. It is, however, difficult to understand how this by-law can be modified in the way in which it was done. Under section 11 (1) of the Act it is for the State government to fix the cess by way of sales-tax. There is no power in the Market Committee to fix the fee under any by-law as it could only adopt the fee prescribed by the Government.

In pursuance of the authority vested under section 11 (1) the Government issued a notification on 28th August, 1958, fixing the rates of levy of cess on goods bought and sold within the notified area. That notification could not, however, govern the present case as the demand was for a period anterior thereto, that is from 23rd November, 1955, to 30th June, 1957. The demand was purported to be made under rule 28 and by-law 23, in their unamended form. As I stated at the beginning the notice of demand was on 11th July, 1957, sometime prior to the notification by the Government fixing the rates. It will be seen that for that period there had been no determination of the fee by the Government and no notification was made in regard to the same.

The validity of the demand has been contested on behalf of the petitioner. Mr. M. K. Nambiar, the learned counsel for the petitioner, urged substantially three contentions. (1) The amendment of section 11 (1) under which what was originally levied and sought to be collected as a fee was made a tax, was a colourable piece of legislation intended to circumvent the decision of this Court which declared the invalidity of the levy as a fee. (2) The levy under section 11 (1) would be invalid even as a tax as such a tax would not be included in the Consolidated Fund of the State to which all taxes levied by its legislature should go under Article 266. (3) The delegation of the power to fix the rate of tax to the excecutive was illegal and therefore the entire provision was illegal.

It was urged that Act XXXIII of 1955 was a piece of colourable legislation intended merely as a cloak or guise for continuing the retention of the levy of a fee when the fee was found to be not permissible under the old Act. According to the argument the Amending Act XXXIII of 1955 only introduced verbal change, and in essence the levy should be deemed to be fee, and, as the levy of fee by way of tax or cess is unauthorised by the Constitution, section 11 (1), in its present form, should be held to be void. The learned counsel also criticised the use of the legislative phrase, " 'cess ' by way of sales-tax " as a thing unknown to legislative phraseology. I cannot, however, agree with this contention. No question of colourable legislation or of motive can at all arise in this case. It is undisputed that there is power in the State Legislature to levy a tax in the shape of sales-tax on goods. This legislation has the effect of levying an additional sales-tax in regard to commercial crop or crops. The Legislature having the power and there being no question of its trespassing on the legislative power of another State or the Union of India, no question

of colourable legislation can at all arise. In *K. C. Gajapathi Narayana Rao and others* v. *The State of Orissa*[1], Mukerjea, J., observed :—

" It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of *bona fides* or *male fides* on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency the question of motive does not arise at all. Whether a Statute is constituitional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament the laws promulgated *by which* could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction. If the constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legsilative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation " has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise."

It cannot be said that in repealing the old section 11 (1) of the Act and reenacting it in its present form the State legislature has transgressed the limits of its enumerated powers. Article 246 (3) read with Item 54 of List II in the Seventh Schedule to the Constitution confers plenary powers to the State Legislature to impose a tax on the sale of goods. Section 11 (1) which levies only a cess by way of sales-tax cannot be impugned as a colourable legislation and as such invalid. Secondly, it was held in *Kutti Koya* v. *State of Madras*[2], that the fee sought to be levied was really in the nature of tax, though mistakenly termed as fee. Therefore, the intention of the legislature even originally was really to levy a tax, as its object was to utilise the amounts collected, for construction of the market and for allied purposes. The amendment has proceeded only to effectuate the real intention of the original enactment by substituting in its place the word " cess " by way of sales tax in the place of " fee ". This would only amount to carrying out of the original intention and not colourable device for collecting fee when such fee was not authorised. The contention, that notwithstanding the amendments referred to above, section 11 (1) in its present form, continues to levy only a fee, cannot therefore be accepted.

It was next contended that the words " cess by way of sales tax " were intended to camouflage what was really a fee and would rather indicate that it was not levied as a sales tax and that the levy being more than what was required for the services rendered by the Market Committee should be held to be invalid. The word "cess" has a definite legal connotation, indicating tax allocated to a particular thing, not forming part of the general fund. Instances may be found among Central Acts, Cotton Cess Act XIV of 1923, the Indian Lac Cess Act XXIV of 1930, Act XXX of 1948, Agricultural Produce Cess Act XXVII of 1940 the Coffee Market Expansion Act VII of 1942, Coconut Committee Act, Salt Cess Act LIX of 1953, The Central Tea Board Act and Tea Cess Act. All these enactments authorise levy of a cess. Amongst local Acts mention may be made of the Madras Sugar Factories Control Act (Act XX of 1949) which authorises the State Government to levy cess. Article 277 of the Constitution refers to " cess " as a special category of the taxes. According to its import, the word " cess " is only tax and not a mere fee. It is, therefore, not necessary for the purpose of levy of cess there should be *quid pro quo* between the service actually rendered and the amount of tax levied, as it is not a fee but a tax.

The next contention of the learned counsel for the petitioner was that the levy as a tax was invalid, as admittedly it would not be brought into the State's Consolidated Fund. It may be noticed that the cess is levied for the purposes mentioned in section 13 of the Act. Section 13 provides that the Market Committee Fund shall be expended for the purposes mentioned therein only. The tax was, therefore, intended solely for the purpose of enabling the Market Committee, providing it

1. 1953 S.C.J. 592 : (1954) S.C.R. 1 at 10.
2. (1954) 1 M.L.J. 117.

with a suitable building and for other expenses in connection therewith. A Market Committee, if, as I shall presently show, it is to be local authority, the tax levied for its purposes would not augment the general revenues of the State. The tax collected being soley for the benefit of the local authority it is but appropriate that it should be termed a cess. It is, therefore, relevant to consider as to what a Market Committee is. Section 4-A of the Act authorises the State Government to establish a Market Committee for every notified area. The committee has the duty of enforcing the provisions of the Act and the rules and by-laws made thereunder in such notified area. The committee has also power to establish a number of markets and providing facilities therefor. Section 6 (2) enacts that the District Agricultural Officer shall *ex-officio* be a member of the Market Committee. Section 7 enacts that the Market Committee shall be a body corporate. Section 9 (3) enacts that the chairman, vice-chairman and every officer or servant of a Market Committee shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code. Licence under section 5 (1) is granted by the Collector. I have already stated the purposes for which the Market Committee has been constituted. Thus a Market Committee is local authority for the purposes of the notified area charged with the duties prescribed under the Act. Section 3 (17) of the Madras General Clauses Act defines local authority thus :—

"Local authority shall mean a municipal committee, district board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with ,the control or management of municipal or local fund".

The Market Committee Fund being a fund to be expended only in connection with the purposes of the market would be a local fund. In *Paul Ltd.* v. *The Wheat Commission*[1], it was held that the Wheat Commission constituted under the Wheat Act of 1932 (22 and 23 Geo. 5, C. 24) was a public authority. In *Griffiths* v. *Smith*[2], it was held that the managers of non-provided public elementary school, a statutory body created by the Education Acts were public authority within the protection of the Public Authorities Protection Act of 1893. A similar protection was also given to the officers of Minister of War Transport under the Crown. Vide *Western India Match Ltd* v. *Lock*[3]. It was held in that case that the Minister, by his officers, was exercising the powers conferred upon him for the benefit of the public, or for what he considered to be for the benefit of the public and so was exercising a public duty, although no member of the public could complain or take proceedings against him if he did not act as he did. Similarly a Market Committee being an organisation for the purpose of regulating the trade of commercial crops so as to give benefit to the producers, will be one which will be exercising an authority entrusted to it as public duty. Its duty is not of a commercial nature, there being no profit motive. It is thus a local authority, restricted in its operations to the notified area. The tax levied under section 11 (1) and collected by such authority would be of a local nature like a municipal tax.

The question then arises whether such taxes are valid and should be brought under the Consolidated Fund. Although to start with the various Presidencies in India were independent of each other, the Regulating Act of 1773 made the Governor of Bengal as Governor-General and the supreme head of all the Provinces. The Charter Act of 1853 gave legislative power to the Governor-General and deprived the Local Governments of the power of independent legislation. After the passing of the Indian Councils Act, the local legislatures had gradually acquired power. But the Government of India's control over revenues and expenditure was derived from the Acts of 1853 and 1858, which treated the revenues of India as one and applied them to the purposes of the Government of India as a whole. This denied to Provincial Governments the right to use revenues which they raised, and they had to look to the Central Government for expenses. But gradually that system was changed. Later on, each Local Government was given a fixed grant for the upkeep of definite services, and a classification of revenue heads into Indian, and

1. L.R. (1937) A.C. 139.
2. L.R. (1941) A.C. 170.
3. L.R. (1946) K.B. 601 at 607.

Provincial was made. Section 80-A of the Government of India Act, 1919, invested the Local Legislature of a Province with power to make laws for the peace and good government of its territories. Section 80-A (3) enacted that the Local Legislature of any Province might not, without the previous sanction of the Governor-General, make any law imposing any new tax unless the tax is a tax scheduled as exempted from this provision by Rules made thereunder. Section 45-A of the Act enabled provision being made by Rules under the Act for the classification of subjects in relation to the function of Government, as Central and Provincial subjects, for the purpose of distinguishing the functions of Local Governments and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature and for the devolution of authority in respect of provincial subjects to Local Governments. Rules were framed under section 45 (1) of the Government of India Act, 1919. These were called the Devolution Rules. Subjects were classified as Central and Provincial, and Provincial Legislatures were given powers to legislate on provincial subjects without over-riding the power of Imperial Legislature to legislate on all subjects for all Provinces. Under that system, distribution of legislative power was only a matter of administrative convenience. The Provincial Legislatures were able to enact laws under the Devolution Rules for taxation in regard to certain specified matters, one of them being for the benefit of the local authorities. Section 143 (2) of the Government of India Act, 1935, recognised this power in the Provinces. It stated :—

> "Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, Municipality or other local authority or body for the purposes of the Province, Municipality, District or other Local area under a law in force on the first day of January, Nineteen Hundred and Thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal list, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

Article 277 of the Constitution saves all taxes, duties, and cesses or fees of the kind mentioned above till provisions to the contrary is made by the Parliament by law. It follows, therefore, that the taxation for the purposes of a local authority could be made by the Provincial Legislatures under the Government of India Act, 1919, and that right was preserved by the Government of India Act, 1935, and the Constitution. Under the Constitution the levy of taxes for the benefit of local authority is within the competence of State Legislature. Artile 246 (3) specifically vests the State Legislature with exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule. Thus both before and after the Constitution, the Provincial or State Legislature had or has power to enact measures to enable a local authority to raise funds for their activities by taxation. In *Dow* v. *Black*[1], a question arose as to whether the Provincial Legislature of Newbrunswick had power to make law so as to impose taxes in connection with the construction of railway line in the State. Under Article 2 of section 92 of the British North America Act, 1867, the Provincial Legislature was enabled to impose direct taxation for a local purpose upon a particular locality within the Province. It was held by the Privy Council that the Act in question related to "a matter of a merely local or private purpose in the province" and it did not relate to the railway, or any local work within the excepted subjects mentioned in Article 10.

The levy of taxes under section 10 for the purposes mentioned in section 14 of the Act would, therefore, be a local tax within the competence of the State Legislature. Being a local tax, it will not form part of the Consolidated Fund envisaged in Article 266 of the Constitution. That article only prescribes that all public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State. By reason of the fact that under the Statute itself the funds collected have been allocated to the local authority, it could not be deemed to be one received by the State and that therefore, such taxes need not and indeed could not go into the

1. (1875) L.R. 6 P.C. 272.

Consolidated Fund of the State under Article 262 of the Constitution. It cannot therefore be held that the levy under section 11 (1) of the Act would be invalid on that ground.

Mr. Nambiar next contended that the provisions of amended section 11 (1) amounted to excessive delegation of legislative powers to the State Government, and that therefore it should be struck down as invalid. Section 11 (1) imposes a tax and such a tax is levied for the benefit of a local authority. A power to tax is exclusively legislative one. But it is not uncommon to find such power being vested in Municipalities and Local Boards, etc., which are also representative institutions. But the power to tax in those cases cannot be justified for the reason that they are representative institutions but depend on the conferment of the same by the appropriate legislature. To take an example the power to tax by a Municipality in the Madras State is derived from an Act of a legislature namely, the Madras District Municipalities Act. Under Article 265 of the Constitution a tax can be imposed by the authority of the law, that is, by an express legislative provision. Under the Constitution power to legislate is vested only in the Union and State Legislatures. *Vide* Article 246. There could therefore be no power to levy a tax either in the executive government or local authority except perhaps under a valid delegation by the appropriate legislature. It is therefore necessary to ascertain as to how far a legislature can delegate its own function to other authorities.

In England, there are no constitutional restrictions, as Parliament is supreme In matters other than taxation the Crown had certain prerogatives. A delegation by the appropriate authority would appear to have no constitutional invalidity. But from the 18th century the powers of the State were shared between the King, Parliament and the Courts. The Donoughmore Committee stated that it was not so much the theory of separation of powers but the fact that officials and bodies had a large measure of autonomy that enabled them to develop under the exigencies of the duties entrusted to them. (Report of the Committee on Member's Powers, page 9). In *R.* v. *Burah*[1], it was stated:

"legislation conditional on the use of particular powers on the exercise of a limited discretion entrusted by the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances may be highly convenient".

The necessity for such delegation was held to be (1) that the Parliament had no time for discussion of details or no ability to decide technical details and (2) there may be necessity for speedy action as in cases of emergency. The safeguards adopted in England against abuse of delegated powers has been laid down in Craies on Statute Law at page 271:

"The safeguards against abuse of delegated powers lie in the following: (i) the delegation must be to some trustworth authority, *e.g.*, a public department, (ii) the limits of the delegated powers should be strictly defined by the statute, (iii) if the interests of any particular section of the community are likely to be affected it should be consulted by the delegated authority before the regulations are made, (iv) publicity. This is extremely important and Judges have from time to time pointed out the difficulty of discovering the relevant rules and regulations affecting any particular line of conduct or branch of industry. (v) There should be machinery provided for revoking or amending the delegated legislation, *Cf.* the Interpretation Act, 1889, section 32 (3). The provisions for laying the rules before Parliament afford, or should afford, a valuable safeguard."

But under the American law where, as in India, legislative power is vested exclusively in the legislature, and there is a separation of powers, between the legislature, judiciary and the executive, the propriety of a delegation is a constitutional issue. The general rule is that the legislature cannot surrender or abdicate its powers. A power not legislative in character could be delegated. The legislature can also delegate to the executive or other bodies the authority to promulgate rules and regulations. But before doing so, they should declare the policy of the law and fix the legal principles, that is, a policy and a standard should be laid down. It should be a case of exercising an authority under the law not one to make the law. In Statutory Construction by Crawford, at page 26, it is observed:—

1. (1878) 8 A.C. 889 at 906.

"So far, however, as the delegation of any power to an executive official or administrative board is concerened, the legislature must declare the policy of law and fix the legal principles which are to control in given cases, and must provide a standard to guide the official or the board empowered to execute the law. The standard must not be too indefinite or general. It may be laid down in broad general terms. It is sufficient if the legislature will lay down "an intelligible principle" to guide the executive or administrative official, or goes " as far as was reasonably practicable under the circumstances existing ", or if the rule laid down was "reasonable and in the interest of the public interest." From these typical criterions, it is apparent that the Courts exercise considerable liberality towards upholding legislative delegations, if a standard is established. Such delegations are not subject to the objection that legislative power has been unlawfully delegated. The filling in of mere matters of detail within the policy of, and according to the legal principles and standards established by the legislature, is essentially ministerial rather than legislative in character, even if considerable discretion is conferred upon the delegated authority. In fact, the method and manner of enforcing a law must be left to the reasonable discretion of administrative officers, under legislative standards. It should be noted, however, that the standard established in criminal statutes must be more exacting and precise, if the statute is to avoid being fatally defective for vagueness and uncertainty, since criminal statutes are strictly construed by the Courts.".

Mr. Nambiar contended that in enacting section 11 (1) the legislature completely abdicated its functions, as it did not determine or lay down any policy to be followed by the State Government in determining the tax payable by the traders to the Market Committee. In support of his contention, the learned counsel has referred to *Panama Refining Co* v. *Ryan*[1]. At page 459 it was held that the question whether such a delegation of legislative power was permitted by the Constitution was not answered by the argument that it should be assumed that the President had acted, and would act, for what he believed to be the public good, and that the point was not one of motives but of constitutional authority. At page 459, Chief Justice Hughes observed :—

" The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly, legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorisations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

This principle has been fully considered in Re *The Delhi Laws Act*[2], where majority of the Supreme Court Judges held that it was competent for the legislature to delegate to other authorities power to frame rules for carrying out the purposes of the law made by it. At page 792 Kania, C.J., observed :—

"It was contended by the learned Attorney-General that under the power of delegation the legislative body cannot abdicate or efface itself......The true test in respect of " abdication " or " effacement " appears to be whether in conferring the power to delegate the legislature, *in the words used to confer the power* retained this control. Does the decision of the delegate, derive sanction from the act of the delegate or has it got the sanction from what the legislature has enacted and decided? Every power given to a delegate can be normally called back. There can hardly be a case where this cannot be done because the legislative body which confers power on the delegate has always the power to revoke that authority and it appears difficult to visualize a situation in which such power can be irrevocably lost......In my opinion, therefore, the question whether there is " abdication " and " effacement " or not has to be decided on the meaning of the words used in the instrument by which the power is conferred on the authority. Abdication according to the Oxford Dictionary, means abandonment, either formal or virtual of sovereignty. Abdication by a legislative body need not necessarily amount to a complete effacement of it. Abdication may be partial or complete. When in respect of a subject in the Legislative List the Legislature says that it shall not legislate on that subject but would leave it to somebody else to legislate on it, why *does it not* amount to abdication or effacement? If full powers to do anything and everything which the legislature can do are conferred on the subordinate authority, although the legislature has power to control the action of the subordinate authority, by recalling such power or repealing the Acts passed by the subordinate authority, the power conferred by the instrument, in my opinion, amounts to an abdication or effacement of the legislature conferring such power ".

1. 79 Law. Ed. 446.

2. (1951) S.C.J. 527: 1951 S.C.R. 747.

In *Hampton JR. & Co.* v. *United States*[1], Taft, C.J., held that if Congress shall lay down by legislative act an intelligent principle to which the person or body authorized to fix the rate of customs duties on imported merchandise is directed to conform, such legislative action is not a forbidden delegation of legislative power. Referring to the division of the Government's power into three branches, namely: Legislative, Executive and Judicial, the learned Chief Justice observed that it was not to say that the three branches were not co-ordinate parts of one Government, that each in the field of its duties might not invoke the action of the two other branches in so far as the action invoked should not be an assumption of the constitutional field of action of another branch, and that the Congress had found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulation. The learned Judge approved of the statement of Judge Ranney in the following words :

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in purusance of the law. The first cannot be done : to the latter no valid objection can be made".

In *Rajnarain Singh* v. *The Chairman, Patna Administration Committee, Patna*[2], the decision in *The Delhi Laws case*[3], was considered. It was held in that case that a valid delegation could go to the extent of authorising an executive authority to modify the law made but not in any essential feature. Such a modification could not include a change of policy, as essentially the legislative function consisted in the determination of legislative policy and its formation as binding rule of conduct. In the recent case *D. S. Garewal* v. *The State of Punjab*[4], the Supreme Court again considered the question of propriety of delegation of legislative power. In that case disciplinary proceedings were started against the appellant who was a member of the Indian Police Service under Rule 5 of the All India Services (Discipline and Appeal) Rules, 1955, framed under section 3 of the Act. The propriety of the proceedings initiated against him was the subject-matter of an application under Article 226 of the Constitution. It was contended that Article 312 laid down a mandate on Parliament to make the law itself regulating the recruitment, and the conditions of service of All India Services, and therefore, it was not open to Parliament to delegate any part of the work relating to such regulation to the Central Government for framing Rules for the purposes. Section 4 of the All India Services Rules enacts :—

> "All Rules in force immediately before the commencement of this Act and applicable to an All India Service shall continue to be in force and shall be deemed to be Rules made under this Act."

The Supreme Court held that it was in effect a statutory provision adopting all the Rules which were in force at the commencement of the Act, governing the recruitment and the conditions of service of the two All India Services and that it was valid. A reference was made to the following observations of Mukherjea, J., (as he then was) in Re *The Delhi Laws Act*[3], at page 982.

> "The essential legislative function consists in the determination or choosing of the legislative poilicy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinateauthority who will work out the details within the framework of that policy. So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply".

In *Syed Md. Co.* v. *State of Madras*[5], the question as to how far the legislature was competent to delegate its powers to other bodies was considered in detail. In that

1. 72 Law Edn. 624.
2. (1954) 2 M.L.J. 344 : (1954) S.C.J. 661.
3. (1951) S.C.J. 527 : 1951 S.C.R. 747.
4. (1959) S.C.J. 399.
5. (1951) 2 M.L.J. 598.

case it was held that what the legislature had done was merely to authorise the rule-making authorities to carry out the policies enunciated in the statute and to fill up the details. The rules themselves were to come into operation only after they were approved by a resolution of the House. Far from effecting self-effacement, the legislature, had retained complete control over the legislation. This decision was approved by the Supreme Court in *Syed Muhamed* v. *State of Andhra*[1]. In *Gopalan* v. *State of Madras*[2], it was held that it was open to the Legislature to delegate its powers to the subordinate authorities, but in that case the assessment was placed before the legislature annually under Article 203 of the Constitution and was subject to its control and was therefore held to be a valid delegation. The learned Advocate-General relied upon a recent decision of the Supreme Court in *Pandit Banarsi Das Bhanot* v. *State of Madhya Pradesh*[3]. In that case the power conferred on the State Government by section 6 (2) of the C. P. and Berar Sales Tax Act, 1947, to amend the schedule relating to exemption was held to be in consonance with the accepted legislative practice relating to the topic and was not unconstitutional. At page 435 it is observed as follows :—

> "On these observations, the point for determination is whether the impugned notification relate to what may be said to be an essential feature of the law, and whether it involves any change of policy Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like".

It may be seen that in the instant case before the amendment by Act XXXIII of 1955, there was maximum fee fixed in regard to rate of levy under the Rules, but under the amended section 11 (1) there was no maximum or minimum fixed. There is no indication in the enactment by way of guidance to the assessing authority. Being a local tax which will not come under the Consolidated Fund, the legislature would have no voice to question its propriety. There is thus no power to control the assessment that may be levied by the executive government by the authority granted to it under section 10. I have referred to the authorities which establish that the existence of a mere power to repeal would not be sufficient to say that the legislature has control over the assessment. It has been held that a taxing provision has essentially 3 features (1) a declaration of liability, (2) assessment or quantification and (3) machinery for collection. Section 11 (1), no doubt, declares a liability and provides the machinery. But the rate of tax which is an essential part of the declaration and assessment has been completely delegated to the executive government with no principles or basis laid down. Uncontrolled power is vested in the executive to fix such rate as it pleases. In the absence of a legislative provision regarding any policy or limits of assessment for the guidance of the assessing authority, it must be held that the provisions of the section amount to excessive delegation of legislative power, and, therefore, invalid.

The learned Advocate-General contended that prior to passing of Act XXXIII of 1955, there had been assessment and levies by the various Market Committees and the legislature should be deemed to have been aware of such levies, and when, therefore, they entrusted the power of assessment to the executive government, they should be deemed to have been satisfied with the propriety of such assessment. Reference was made to section 10 of the Amended Act which validated all fees levied and collected, as affording an indication that the legislature has applied its mind to the levy and approved of the same. I cannot, however, accept this contention. Section 11 (1) does not purport to limit the power of the executive government to levy cess by way of sales tax at the rates already fixed or to any particular amount but instead it gives uncontrolled powers in the matter of fixation of rate of tax. That is illegal.

The learned advocate for the petitioner then contended that the demand was invalid for the reason that the notification fixing the rate of tax under section 11 (1)

1. (1954) S.C.R. 1117 : 1954 S.C.J. 390 : (1954) 1 M.L.J. 699.
2. (1958) 2 M.L.J. 117 : I.L.R. (1958) Mad. 798.
3. (1958) 9 S.T.C. 388 : 1959 S.C.R. 427.

was made only on 11th July, 1957 and as liability to pay the tax does not arise till the rates were fixed, the Market Committee would have no right to levy a tax or fee for any anterior period. Section 11 (1) does not have any retrospective effect. The demand for the anterior period however is sought to be justified under the provisions of section 10 of the Amending Act XXXIII of 1955. That provision runs :—

"10. (1) Notwithstanding anything contained in any law or in any judgment, decree or order of any Court, all fees levied and collected or purporting to have been levied and collected by Market Committees under section 11 of the principal Act before it was amended by this Act shall be deemed always to have been levied under the principal Act as amended by this Act as if this Act was in force at all relevant times.

(2) No suit or other proceeding shall be maintained or continued in any Court for the refund of any fee so paid ; and no Court shall enforce any decree or order directing the refund of any fee so paid".

That section would only apply to the case where a fee had been levied and collected and not to a case like the present one where the Market Committee is only seeking to enforce a liability. I am of opinion that the provisions of section 10 cannot apply for another reason as well. Section 10 says that the levy made and collected shall be deemed always to have been levied under the principal Act as amended by the Amending Act as if latter had been in force at all relevant times. That could only mean that the levy was made by the executive government as envisaged in section 11 (1) of the Act and not that fee levied and collected as if it were determined by or approved by the legislature, that is to say, the levy had been made by the executive government as if it acted under section 11 (1). I have already held that determination of the tax by the executive government under section 11 (1) was invalid, the power not having been validly delegated by the legislature. It, therefore, follows that section 10 could not validate the collection of fees made before the Amending Act.

The learned Advocate-General then contended that although the decision in *Kutti Koya* v. *State of Madras*[1], held that the licence fee for the purpose of section 13 was invalid as in reality it was only a tax, the decision did not consider the propriety of the levy as a licence fee, whether it bore a legitimate relationship to the services rendered by the Committee. In support of his contention, the learned Advocate-General placed before me a statement of the receipts of the Coimbatore Market Committee from 1952 to 1956, demonstrating that the receipts were just sufficient to cover the expenses incurred. But this contention could not be accepted, because under section 11, as it originally stood, levy was made for various purposes and not merely in connection with the services rendered by the Market Committee. Having regard to the purposes mentioned in section 13, it should be held that what was levied was a tax though called a fee. The provisions of the old section 11 (1) having been found to be invalid, the levy thereunder could not be justified as licence fee. Further, in view of the fact that section 13 confers benefits which could be secured by raising a tax as well as fee, it will be difficult in such a case to apportion between that which could validly represent licence fee and that which could be considered as a tax. In *M/s. Ram Narain Sons Ltd.* v. *Asst. Commissioner of Sales Tax and others*[2], the Supreme Court held that where an assessment consisted of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation, rendered the assessment invalid *in toto*. In the present case it will not be possible to disassociate the portion of the fee collected for the purpose of services rendered with the portion which was outside those purposes, that is, those that could be achieved only by collecting a tax. It, therefore, follows that the entire assessment is bad.

The learned advocate for the petitioner next contended that section 11 (1) should be held to be invalid, as it would be hit by Article 14 of the Constitution. It is urged that the provisions of section 11 are not general in their scope and are not

1. (1954) 1 M.L.J. 117. (1952) 2 S.C.R. 483 (S.C.).
2. (1952) 2 M.L.J. 302 : (1952) S.C.J. 808 :

applicable to all dealers within the State, but that only a few districts are picked out by the State Government. It is further contended that while under the Madras General Sales Tax Act a dealer has right of appeal to the departmental authority and to an independent Tribunal with a power of revision by the High Court, there is no such right in a case of levy under section 11 (1) of the Act. I am satisfied that there is no substance in this contention. The object of the Act is to give protection to the producers of commercial crops and the Government could validly apply that Act, to begin with, to the selected areas. It cannot be said that there is infringement of Article 14 of the Constitution. Marketing legislation of this type is for the welfare of the general public. As regards the procedural right, it is enough to point out that it is not an uncommon feature in enactments dealing with local bodies not to provide a right of appeal. In such a case the assessee has got right of resort to the civil Court if the assessing authority exceeded its jurisdiction. The levy of cess could also be challenged if prosecution is initiated to enforce it in a criminal Court. There is, therefore, no substance in the contention that the provisions of the Act offend the equal protection of law guaranteed by Article 14 of the Constitution.

In the result, I am of opinion that the Market Committee cannot properly call upon the petitioner to pay the cess for groundnut purchased from 23rd November, 1955 to 30th June, 1957, under section 11 (1) of the Madras Commercial Crops Markets Act, as section 11 (1) is invalid. A writ will issue. No order as to costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

Present :—Mr. P. V. Rajamannar, *Chief Justice*, and Mr. Justice Ramachandra Iyer.

M/s. India Coffee and Tea Distributing Company, Ltd., Madras .. *Appellants.**

v.

The State of Madras by Collector of Madras. .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), sections 2 (i), 5 (v) and 14-A—Scope—Sale of agricultural produce (tea and rubber)—Non-resident principal—If entitled to exemption from assessment—Section 5 (v)—Delivery outside the State—Actual delivery—What constitutes.

It is clear from the provisions of section 14-A of the Madras General Sales-Tax Act that it is really the non-resident principal that is assessed to the tax and the agent is deemed to be a dealer in respect of his business as a convenient representative for assessment, levy and collection of the tax. The assessment is with reference to the sales on the principal's account and the rates of tax are those applicable to him. The agent is given a statutory right to retain out of monies of the principal in his hands a sum equal to the tax assessed or paid. Under section 14-A (ii) the agent is made liable to pay the tax irrespective of the fact whether the amount of turnover of the business was less than the minimum specified in section 3 (3) or not. In case the turnover happens to be less than the minimum specified in section 3 (3) the principal is given a right to obtain a refund under section 14-A (iv). The reason for the rule excluding the provisions of exemption under section 3 (3) while assessing the agent appears to be that it might happen that the non-resident principal would be employing more than one agent and if the agents were allowed to take advantage of the provision as to minimum turnover in section 3 (3) the principal would be able to evade taxation by entrusting his sales to several agents each to the limit of a minimum turnover. The assessment and the levy of tax being thus on the principal it is clear on principle he should be enabled to obtain all the exemptions that he would be entitled to obtain had he been resident in the State.

Section 14-A (ii) deals only with the case of assessment of agent without regard to the minimum turnover provided for in section 3 (3) and section 14-A (iv) enables the principal to apply for and obtain refund only in such a case. The matters dealt with under section 2 (i) and section 5 (v), relate to other exemptions from taxation and in the absence of a provision like section 14-A (ii) in regard to such exemptions there is no scope for assessment in respect of agricultural produce or tea intended for and exported to another State. There is nothing in section 14-A or in any other provisions of the Act to tax the exempted goods in the hands of the agent leaving it to the principal to obtain

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* O.S.A. Nos. 29 and 30 of 1955. 4th April, 1958. (14th Chaitra, 1880—Saka.)

a refund. The assessee would be entitled to the exemptions under section 2 (i) in regard to the sale of rubber during the period of assessment and of tea till 1st January, 1948.

Judgment in T.R.C. Nos. 38 to 40 of 1955 referred.

The exemption under section 5 (v) can be claimed only if the assessee proves that the sale of tea was for delivery outside the State and that the delivery was actually made outside the State. One of the points for determination in this connection is as to what is meant by actual delivery in section 5 (v), and what was the kind of delivery contemplated and effected by the parties and this will depend to a large extent on the nature of the contract between the parties. In view of the fact that section 5 (v) contemplates actual delivery questions may arise whether in f.o.b. and c.i.f. contracts a delivery of the bill of lading would amount to actual delivery, and where in point of fact was the delivery intended. [The suits were remanded for fresh disposal on this point.]

Case-law discussed

Appeals against the judgment and decree of the Hon'ble Mr. Justice Ramaswami dated 26th April, 1954 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C.S. Nos. 51 and 163 of 1951 respectively.

G. R. Jagadisan and *T. V. Balakrishnan*, for Appellants.

G. Ramanujam, for The Additional Government pleader (*K. Veeraswami*), for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The plaintiff M/s. Indian Coffee and Tea Distributing Company Ltd., has filed these appeals against the Judgment of Ramaswami, J., in two suits, C.S. Nos. 51 and 163 of 1951. The appellant is a company registered under the Indian Companis Act with its head office at Bombay carrying on business at Madras. The main business of the Company is stated to consist of the sale of tea and rubber in India and outside on behalf of resident and non-resident principals. In respect of tea and rubber sold by the company during 1947-48 as commission agents the Deputy Commercial Tax Officer, Mannady, Madras, assessed the turnover at Rs. 43,03,171-15-6. Rs. 22,14,764-11-8 of the turnover represented the price of the goods sold on behalf of the resident principals and the balance Rs. 20,88,407-3-10 represented sales on behalf of foreign principals. Out of this Rs. 19,68,064-11-7 represented the price of goods exported outside India. The Deputy Commercial Tax Officer assessed the plaintiff to sales-tax on the entire sum of Rs. 43,03,171-15-6. The company preferred an appeal against this order of assessment to the Commercial Tax Officer, North Madras. The appellate authority validated the licence in favour of the plaintiffs as agent of known principals and in consequence exempted that portion of the turnover which represented the value of the goods sold on behalf of the resident principals, confirmed the original assessment in regard to the balance of Rs. 20,88,407-3-10 and levied a tax of Rs. 21,207-6-2. The Company contested the correctness of this order in a revision petition to the Board of Revenue but the attempt was not successful. C. S. No. 51 of 1951 out of which O.S.A. No. 29 of 1955 arises was filed by the appellant against the State of Madras represented by the Collector of Madras for a declaration that the assessment made by the Commercial Tax Officer was illegal and void. For the year 1948-49, the Deputy Commercial Tax Officer Mannady Division, Madras, assessed the appellant to sales-tax on a turnover of Rs. 36,69,741-3-3. The plaintiff preferred an appeal to the Commercial Tax Officer, North Madras, against this order of assessment. The appellate authority reduced the tax by Rs. 700 but otherwise confirmed the order of assessment. In an application for a revision of the order, the Board of Revenue exempted the sales effected on behalf of the resident principals by validating the licence retrospectively on payment of penalty, and the assessment in pursuance of the order of the Board of Revenue was ultimately made by the Deputy Commercial Tax Officer on a turnover of Rs. 21,40,743-0-0 at Rs. 33,449-1-9. For the year 1949-50 the Deputy Commercial Tax Officer determined the turnover of the plaintiff at Rs. 2,96,750-15-6. On appeal to the Commercial Tax Officer the sales on behalf of the resident principals were exempted by validating the licence retrospectively on payment of the penalty and the turnover was reduced to Rs. 25,470-12-0 and a tax on Rs. 397-15-6 was

levied. That assessment was also confirmed by the Board of Revenue. The Company filed C. S. No. 163 of 1951 out of which O.S. A. No. 30 of 1955 arises for a declaration that the assessment for the years 1948-49 were illegal and void. The case of the plaintiff was that they were only acting as commission agents for certain principals and they could not be deemed to be and assessed as dealers, that the sales did not take place within the State of Madras and that the turnover in respect of tea and rubber could not be assessed as they were agricultural produce and further as the tea that was exported was grown by their principals in their estates they were exempt from taxation. The State of Madras filed written-statements in the two suits contesting the plaintiff's claim and pleading that the appellant was a dealer within the meaning of section 2 (*b*) of the Madras General Sales Tax Act, 1939, that the sales took place at Madras and that the Company were not entitled to the exclusion of sales of tea and rubber as agricultural produce or to an exemption in regard to sales of tea to foreign buyers as those commodities were grown in the estates of non-resident foreign principals. Issues were settled on the pleadings between the parties but no evidence was let in beyond filing the relevant assessment orders and notices that passed between the parties. Ramaswami, J., held that the plaintiffs were dealears within the meaning of the Act though they were only commission agents, that the sales to foreign buyers took place at Madras, that though tea and rubber were agricultural produce the plaintiffs would not be entitled to the exclusion of their sales from the computation of the turnover as the principal for whom the appellant was acting was non-resident foreigner. The learned Judge also held that the tea and rubber were produced outside the State of Madras. On those findings the two suits were dismissed with costs. The plaintiffs have filed the appeals against the judgments.

Mr. G. R. Jagadeesan, appearing for the appellant, did not contest the assessment for the year 1949-50 but confined his argument only in regard to assessment for the year 1947-48 and 1948-49. Substantially the contention on behalf of the appellant centered on two grounds of exemption, *viz.*, (1) under section 2 (*i*) which exempts sale of agricultural produce and (2) under section 5 (*v*) which exempts sale of tea intended for and delivered outside the State of Madras. On behalf of the State both these claims were contested on the ground that both tea and rubber were not grown by the assessee but only by his non-resident foreign principal.

Under section 3 (*i*) of the Madras General Sales Tax Act, 1939, every dealer is to pay a tax for each year on his total turnover. Section 2 (*i*) defines turnover as the aggregate amount for which goods are bought or sold provided that the proceeds of sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest shall be excluded from his turnover. The learned Judge after considering the several suthorities on the subject held that tea and rubber would be agricultural produce. But by reason of an amendment to the Act introduced by Act XXV of 1947 tea was excluded from the definition of agricultural produce in section 2 (*a*). This amendment came into force on 1st January, 1948. The learned Government Pleader conceded that rubber would be an agricultural produce. But the right to have the sales of rubber and of tea, prior to 1st January, 1948 exempted, is contested on behalf of the Government on the ground that the appellant was assessed as a dealer, that rubber and tea were grown not in its estate but in the State of its non-resident principal and that therefore the appellant would not be entitled to the exclusion of the sales in the assessment of the turnover. The same objection is taken in regard to the claim for exemption from assessment made by the appellant under section 5 (*v*) of the Act. Section 5 (*v*) of the Act was repealed by Act I of 1957 but it was in force during all the years of assessments concerned in the two appeals. The provision of that sub-section was as follows:

"The sale of tea grown by the seller or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise shall be exempt from taxation under section 3, sub-section (1) if the sale is for delivery outside the State and delivery is actually so made."

The case for the appellant is that as the sales of tea were for export outside the State it would be entitled to the exemption granted by section 5 (*v*) even though the tea was grown by and on the estates of its non-resident principal. To enable the appellant

to get the benefit of the exemption two conditions must be satisfied : (1) that the tea should have been grown by and on the land in which the seller had one of the interests specified in the sub-section. (2) The sale should be intended for delivery outside the State and delivery should actually be so made. The former condition is practically the same as the one relevant under section 2 (i). Two questions therefore arise for determination in the appeals *viz.*, whether the appellant, a commission agent, would be entitled to the exemption contemplated by section 2 (*i*) and section 5 (*v*) of the Madras General Sales-Tax Act in respect of the sales of goods which were grown in the estate of and by its non-resident principal ; (2) whether the sales sought to be assessed were for delivery outside the State and delivery was actually so made.

Before considering the two questions set out above it is necessary to refer to one matter which the learned Judge decided against the appellants. The learned Judge held that the land on which tea was grown was outside the State. We are not able to ascertain from the record as to how this question arose. The claim of the appellant was not resisted by the respondent on this basis. There was no plea, issue or even evidence that the lands on which tea was grown were outside the State of Madras. In all the assessment proceedings it was assumed that the lands were within the State. We should, therefore, proceed on the basis that for the purpose of these appeals the tea and rubber were grown on lands situate in the Madras State.

Taking up the first question, the contention on behalf of the State was that a commission agent was a dealer and to enable him to obtain the exemptions under section 2 (*i*) and section 5 (*v*) the land on which the rubber and tea were grown should belong to him and that it would not be sufficient if they are grown on the lands of his principal. The learned Judge held that the exemptions could be claimed only by resident estate owners and that even if such exemption could be claimed by the non-resident principal it could not be claimed by his commission agent. For a due appreciation of the controversy it is necessary to determine the position of a commission agent in the scheme of the Act. He would be a dealer within the definition in section 2 (*b*) and would be liable to assessment by virtue of section 3 (*i*). Section 8 provides that if a commission agent obtains a licence under the section, he could exclude from his turnover all sales specified in his accounts on behalf of known principals that are carried out in accordance with the terms of his licence. This however, was subject to certain provisions one of them being that the amounts of sales in respect of such transactions should be included in the turnover of the principals except when they are covered by exemptions granted under the Act. In the case of a foreign principal referred to in the Act as a non-resident, these provisions are modified to a certain extent by section 14-A of the Act which runs as follows :—

"In the case of any person carrying on the business of buying or selling goods in the State but residing outside it (hereinafter in this section referred as a non-resident) the provisions of this Act shall apply subject to the following modifications and additions namely :—

(i) in respect of the business of the non-resident, his agent residing in the State shall be deemed to be the dealer.

(ii) The agent of a non-resident shall be assessed to tax or taxes under this Act at the rate or rates leviable thereunder in respect of the business of such non-resident in which the agent is concerned irrespective of the amount of the turnover of such business being less than the minimum specified in section 3, sub-section (3).

(iii) without prejudice to his other rights, any agent of a non-resident who is assessed under this Act in respect of the business of such non-resident may retain out of any moneys payable to the non-resident by the agent, a sum equal to the amount of the tax or taxes assessed on or paid by the agent.

(iv) Where no tax would have been payable by the non-resident in respect of his business in the State by reason of the turnover thereof being less than the minimum specified in section 3, sub-section (3) he shall be entitled to have the amount of tax or taxes paid by his agent, refunded to him on application made to the assessing authority concerned or where more than one such authority is concerned, to such one of the authorities as may be authorised in this behalf by the State Government by general or special order.

(v) such application shall be made within twelve months from the end of the year in which payment was made by or on behalf of the non-resident of the tax or taxes or any part thereof."

It is clear from the provisions of this section that it is really the non-resident principal that is assessed to tax and the agent is deemed to be a dealer in respect of his business as a convenient representative for assessment, levy and collection of the tax. The assessment is with reference to the sales on the principal's account and the rates of tax are those applicable to him. The agent is given a statutory right to retain out of monies of the principal in his hands a sum equal to the tax assessed or paid. Under section 14-A (ii) the agent is made liable to pay the tax irrespective of the fact whether the amount of turnover of the business was less than the minimum specified in section 3 (3) or not. In case the turnover happens to be less than the minimum specified in section 3 (3) the principal is given a right to obtain a refund under section 14-A (iv). The reason for (the rule) excluding the provisions of exemption under section 3 (3) while assessing the agent appears to be that it might happen that the non-resident principal would be employing more than one agent and if the agents were allowed to take advantage of the provision as to minimum turnover in section 3 (3) the principal would be able to evade taxation by entrusting his sales to several agents each to the limit of a minimum turnover. This aspect of the matter is referred to in an unreported judgment of this Court in T.R.C. Nos. 38 to 40 of 1955 which held that sub-section (ii) of section 14-A has been designed to counteract this possibility. This is consistent only with the principal and not the agent being liable to pay the tax. In the case of a resident known principal section 8 provides conditions for directly assessing him ; in the case of a non-resident principal doing business in the State, a machinery within the State is necessary for assessment and the agent is deemed to be the dealer. But the tax is levied on the principal's business. The assessment and the levy of tax being thus on the principal it is clear on principle he should be enabled to obtain all those exemptions that he would be entitled to obtain had he been resident in the State. Ramaswami, J., was inclined to take the view that section 14-A (iv) should be read so as to enable the principal to obtain a refund even in cases not covered by section 14-A (ii) and there being thus a provision for refund section 14-A by implication disentitled the agent from getting any exemption, it being left to the principal to obtain a refund of the tax paid. We regret we are unable to agree. Section 14-A (ii) deals only with the case of assessment of the agent without regard to the minimum turnover provided for in section 3 (3) and section 14-A (iv) enables the principal to apply for and obtain refund only in such a case. The matters dealt with under section 2 (*i*) and section 5 (*v*) relate to other exemptions from taxation and in the absence of a provision like section 14-A (ii) in regard to such exemptions there is no scope for assessment in respect of agricultural produce or tea intended for and exported to another State. There is nothing in section 14-A or in any other provision of the Act to tax the exempted goods in the hands of the agent leaving it to the principal to obtain refund. In the decision in T.R.C. Nos. 38 to 40 of 1955 to which reference has been made already the learned Judges held that there is no provisions anywhere in the Act or in the Rules by which the non-resident principal might be entitled to obtain a refund of the amounts covered by the exemption under the definition of "turnover" in section 2 (*i*) but collected from the agent. In that case the question arose whether a commission agent who acted for a non-resident principal could claim on behalf of his principal exemption from paying tax on business in respect of an agricultural produce sold by the agent but which was grown by the principal on his land, and the learned Judges held that he could. Referring to section 14-A the learned Judges observed :

"In our opinion this is a clear indication that though for the purpose of the machinery of collection the resident agent is treated as an assessee the person whose tax liability is really sought to be reached is the non-resident principal and that is the entire ratio of the right to refund granted by sub-section (iv). This aspect is emphasised by the provision in sub-section (iii) by which the resident agent is entitled statutorily to retain out of the monies of his principal the amount which he paid by way of tax. These features, in our opinion, ought to be taken into acocunt in construing the scope of the fiction created by sub-section (i) by which the resident agent is treated as a dealer. If it is really a vicarious liability that is fastened on the resident agent the person who really and ultimately has to pay the tax being the non-resident principal it would be clear that the turnover in the hands of the agent who is by statutory fiction deemed to be the dealer, cannot be held to include what is statutorily exempted from the computation of that turnover. The turnover of the agent dealer is the aggregate of the prices realised by the sales of the commodities belonging to the principal. This agent might be acting for several principals. He is deemed to be "as many dealers" as there are "non-

resident principals" for whom he is dealing. If, therefore, there is an exemption attaching to the goods of one or more of these principals whose sale is included in that turnover it stands to reason that that exemption would be attracted to the sale of such goods by this agent for really it is the principal's goods that he sells and it is the sale of those goods that occas ions the tax liability."

The learned Judges held that the absence of any provision like section 14-A (iv) in regard to the assessment of the turnover of an agent is indicative that the exclusion was intended to be operative even in the first instance while the tax liability of the agent was being ascertained. We entirely agree with the reasoning and conclusion of the learned Judges. Section 14-A not having provided for a refund in cases other than that dealt with under sub-section (iv) of the section cannot be used to imply a right in the taxing authority to tax the whole of the sales regardless of the exemptions. We, therefore, hold that the appellant would be entitled to the exemptions under section 2 (i) in regard to the sale of rubber during the period of assessment and of tea till 1st January, 1948.

The second question relates only to the exemption claimed under section 5 (v). In that case the appellant should prove further that the sale of tea was for delivery outside the State and that the delivery was actually made outside the State. Although the appellant pleaded that he was entitled to the exemption under section 5 (v) no evidence was let in in regard to the place of delivery. The learned Judge found, a finding which is not challenged by the learned advocate for the appellant, that the property in the goods passed to the buyer at Madras. The place where property in the goods passed to the buyer need not necessarily be the place of delivery. The place of delivery is regulated by aggreement between the parties. Benjamin in his book on Sales stated at page 685 :—

"There is no branch of law of sale more confusing than that or delivery. The word is unfortunately used in very different sense and these should be borne in mind. The word delivery is sometimes used with reference to the passing of the property in the chattel; sometimes to the change of its possession. In a word it is used in turn to denote transfer of title or transfer of possession."

The learned author then proceeds to point out how even in regard to possession it is employed at the stage of the formation of the contract and at the time of performance and how that possession during performance of the contract may be constructive or actual. One of the points for determination in this connection is as to what is meant by actual delivery in section 5 (v). One view is that actual delivery is physical or manual delivery of the goods. The other view which is contended for by the respondent is that words 'actual delivery' in section 5 (v) are used as contra-distinguished from the intention to deliver and should include symbolical delivery. The learned Government Pleader, therefore, argued that on the finding of the learned Judge there was a transfer of the bill of lading at Madras which should be deemed to be transfer of the goods at Madras. Re relied in this connection upon a decision in *Wrington* v. *McArthur and Hutchinsons Ltd.*[1] In that case the defendant company, in order to secure the plaintiff against loss set aside certain specified goods in two rooms in the defendant's premises which were locked up and the keys were handed over to the plaintiff, no other goods being in those rooms. It was held that possession of the goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up notwithstanding that those two rooms were on the defendant's premises. That case merely held that possession could be given symbolically and is of no assistance to show that when a statute expressly requires delivery of actual possession symbolical possession would be sufficient. The decision reported in *Mohammad Ishak* v. *State of Madras*[2], was next relied on. That case was concerned with the interpretation of Article 286 of the Constitution under which a sale shall be deemed to have taken place in the State in which the goods were actually delivered as a result of such sale for purposes of consumption in that State notwithstanding the general law relating to the passing of property in the goods. There was a contract for the sale of oil which was to be filled in drums supplied by the foreign buyer. The goods were delivered to the carrier within the State of Madras with railway receipts in the name of the buyers as consignees. Though ultimately the goods were sent to

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1. L.R. (1921) K.B. 807.　　2. (1955) 2 M.L.J. 319.

Cochin State the passing of the property in the goods was complete within the State of Madras. The learned Judges held that actual delivery of the goods to the buyer was within the State of Madras and the consumption in the Cochin State cannot imply a second delivery there and that therefore the sales were liable to tax. In this case the goods were actually delivered within the State of Madras and we are not able to appreciate how it can advance the case of the respondent. It has been said that a C.I.F. contract is an agreement for the sale of goods to be performed by the delivery of documents and not a mere sale of documents. The law as to passing of property in the goods by indorsement of a bill of lading has been stated in *Sanders* v. *Maclean*[1], by Bowen, L.J., as follows :

"A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law-merchant is universally recognised as its symbol and this indorsement and delivery of the bill of lading operates as symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass just as under similar circumstances the property would pass by an actual delivery of the goods, and for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof the bill of lading until complete delivery of the cargo has been made on shore to someone rightfully claiming under it remains in force as a symbol and carries with it not only the full ownership of the goods but also all rights created by the contract of carriage between the shipper and the ship-owner. It is a key in the hands of rightful owner intended to unlock the door of the warehouse floating or fixed in which the goods may chance to be."

These observations merely indicate how delivery can be effected in a C.I.F. contract. Whether all the contracts were C.I.F. contracts and what kind of delivery was intended or given would depend on the evidence in regard to the transactions. The question may have also to be decided after taking evidence whether in the interpretation of section 5 (*v*) in relation to a C.I.F. or F.O.B. contract actual delivery means actual delivery of the bill of lading. The distinction between constructive and actual delivery has been adverted to in the dissenting judgment of Venkatarama Aiyer, J., in *Bengal Immunity Company* v. *State of Bihar*[2] who observed at page 285 as follows :—

"The fact is that while for some purposes delivery to the common carrier is treated as delivery to the purchaser, there is delivery in fact and in its popular sense, only when the purchaser obtains possession of the goods and it is this that is connoted by the words 'actual delivery'. When section 51 (1) (Sale of Goods Act) refers to delivery to the buyer or his agent, it refers to actual delivery and delivery to common carrier is regarded as constructive, having regard to section 39 (1). The section, it will be noticed, proceeds on the footing that a common carrier is not the agent of the buyer with reference to actual delivery. He is the agent of the purchaser for transmission of the goods to him. It must accordingly be held that the expression "actual delievry" in the *Explanation* to Article 286 (*a*) means delivery of the goods to the purchaser or his agent and delivery to the common carrier is not actual delivery."

The importance of this question does not appear to have been realised when the case was presented at trial. The contracts have not been produced and no evidence was tendered as to in whose name was the bill of lading taken and as to whether the Banker at Madras was the agent of the buyer or seller. The learned Judge has stated in his judgment that goods "were shipped F.O.B. Cochin and C.I.F. Foreign Ports" and that the goods were deliverable in foreign countries. Having regard to the large number of transactions all of which may not be of the same pattern, evidence of a more specific kind with particular reference to the place where the goods were delivered would be necessary before the claim for exemption can be satisfactorily adjudicated. Two questions may arise : (1) what was the kind of delivery contemplated and effected by the parties and this will depend to a large extent on the nature of the contract between the parties; (2) in view of the fact that section 5 (v) contemplates actual delivery questions may arise whether in F.O.B. and C.I.F. contracts a delivery of the bill of lading would amount to actual delivery and where in point of fact was the delivery intended. In the absence of further evidene it is not possible to decide as to whether delivery was intended and where it was actually made and what exactly was the kind of delivery that was bargained for. None of the parties appear to have realised at the time of trial the necessity for the evidence on these matters.

1. L.R. (1883) 2 Q.B. 327 at 341. 2. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672.

The burden of proof is no doubt on the appellant and but for the fact that the entire case proceeded on the footing that the only relevant consideration was the place of passing of property, we would have been reluctant to give a further opportunity to the appellant to let in evidence on the question of delivery. In the circumstances of this case we consider that in the interests of justice an opportunity should be given to the parties to let in evidence on the question as to whether the appellant has made out a case for exemption under section 5 (*v*) of the Madras General Sales Tax Act. The appellant's right to exemption in regard to sales of tea prior to 1st January, 1948 and of rubber during 1947-48 and 1948-49 is declared and his claim in respect of the assessment for the year 1950-51 is dismissed. The suits will be remanded to the Original Side for fresh disposal in the light of the above observations. There will be no order as to costs.

R.M. ——— *Suits remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Santha (minor) by next friend D. B. Purushothama Chettiar and another .. *Petitioners**

v.

T. K. Natarajan Pillai and two others .. *Respondents.*

Civil Procedure Code (V of 1908), section 2 (11) and Order 22, rule 3—Scope —Universal legatees under will by Hindu widow holding life estate—Right to be brought on record as legal representatives in suit by her—Question for consideration—Dispute as to extent of interest passed by her and maintainability of suit—Relevancy—Hindu Succession Act (XXX of 1956), section 14—Applicability.

In an application under Order 22, rule 3, Civil Procedure Code, to bring the petitioners on record as legal representatives in the place of the deceased plaintiff, the only question for consideration is whether the petitioners are the legal representatives of the deceased. The Court is not interested in adjudicating at that stage what exactly was the extent of the interests possessed by the deceased plaintiff and whether the suit as laid by the deceased was sustainable against the defendants. Universal legatees under a will executed by the deceased, the genuineness of which is not disputed, are legal representatives entitled to be brought on record in the place of the deceased.

Where a Hindu widow holding a life estate dies pending a suit brought by her after the coming into force of the Hindu Succession Act XXX of 1956, legatees claiming under her will would be her legal representatives. Being in possesson of her husband's properties as an heir, she would be entitled to get absolute title to the properties by virtue of section 14 of that Act and would be competent to dispose of the properties by will, and, therefore, the legatees under the will would be entitled to be brought on record as her legal representatives.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tirukoilur, dated 15th April, 1958 and made in I.A. No. 79 of 1958 in O.S. No. 232 of 1956.

M.S. Venkatarama Aiyer, for Petitioners.

G. R. Jagadisan, for Respondents.

The Court made the following

ORDER.—One Bangaru Ammal filed a suit for recovery of possession of certain properties from the respondents on the ground that the properties were inherited by her from her deceased husband and that she was entitled to possession of the same. The contesting respondents claimed title to the properties under one Andalammal, daughter of Bangaru Ammal. Their case was that the husband of Bangaru Ammal had executed a will bequeathing the properties in favour of Andalammal, who, in turn, sold it to the contesting respondents. Bangaru Ammal died pending her suit for possession, and the petitioners, claiming as the universal legatees under a will executed by Bangaru Ammal, filed an application under Order 22, rule 3, Civil Procedure Code, to bring them on record in the place of the deceased Bangaru Ammal. The learned District Munsiff dismissed the Application.

*C.R.P. No. 1790 of 1958. 25th September, 1959. (3rd Asvina 1881—Saka.)

I am unable to understand the judgment of the learned District Munsif. At the present moment the only question for consideration by the Court is whether the petitioners are the legal representatives of the deceased Bangaru Ammal. The Court is not interested in adjudicating at this stage what exactly was the extent of the interests possessed by Bangaru Ammal, and, whether the suit as laid against the alienee of Andalammal, was sustainable. On this question, *viz.*, whether the petitioners are the legal representatives of the deceased Bangaru Ammal, there can be no doubt. It is not disputed that there is a will in their favour. It is not stated that the will is not genuine, or, that they were not universal legatees. Under the circumstances, it would follow that the petitioners would be legal representatives entitled to be brought on record.

Mr. Jagadisa Ayyar, the learned counsel for the respondents, however, raised the contention that the right to sue did not survive to the petitioner after the death of Bangaru Ammal. His argument was that Bangaru Ammal, even if her case were true, held only a Hindu woman's interest in the properties, and, that on her death, there would be nothing left for any testamentary disposition of hers to take effect. It was, therefore, contended that there can be no legal representatives in respect of the suit filed by Bangaru Ammal in regard to her properties inherited by her from her husband.

Bangaru Ammal died after the coming into force of Act XXX of 1956. If she was in possession of the properties of her husband as an heir, she would be entitled to get her absolute title in regard thereto by virtue of section 14 of the Act. That would enable her to dispose of the properties by a will.

It was contended that section 14 of the Act would not apply to the present case as the widow was not in possession of the properties. According to Bangaru Ammal they were in the possession of trespassers as Andalammal had no right to dispose of the properties. Whether, in these circumstances, Bangaru Ammal would be disentitled to the benefit of section 14 of the Hindu Succession Act, need not be decided here. It would be open to the respondents, if so advised, to raise all these questions in the suit itself. But, that would be no answer to the application for impleading the petitioners as legal representatives in the place of the deceased Bangaru Ammal. The learned District Munsif was, therefore, in error in refusing to implead them as legal representatives.

The Civil Revision Petition is allowed and the petitioners are directed to be impleaded as legal representatives of the deceased Bangaru Ammal. There will be no order as to costs.

P.R.N. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Meenammal .. *Petitioner**

v.

S.N. Oavai Reddiar and another .. *Respondents.*

Stamp Act (II of 1890), *section* 35—*Promissory Note—Inadmissible as insufficiently stamped—Suit on the Original cause of action—When maintainable—Limitation Act (IX of* 1908), *section* 19—*Endorsements of payments in the promissory note inadmissible—If would save limitation—Evidence Act (I of* 1872), *section* 91—*Rate of interest—Parol evidence—Admissibility.*

Where the promissory note was taken not in satisfaction of the debt advanced earlier that day, but merely as a security for the repayment of the debt, the suit based upon the original cause of action, the debt itself, is maintainable.

* C.R.P. No. 1938 of 1958. 14th August, 1959.
(23rd Sravana, 1881—Saka.)

The endorsements of payment made in the promissory note which was inadmissible in evidence for want of sufficient stamp would operate as acknowledgment of the debt itself and would save limitation.

Since parol evidence is inadmissible to prove the rate of interest payable on the debt, under the Interest Act the debtor would be liable to pay six per cent. interest from the date of the loan.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the Order of the Court of the Subordinate Judge of Madurai, dated 1st July, 1958 and made in S.C.S. No. 607 of 1956.

S. K. Ahmed Meeran, for Petitioner.

T. R. Ramachandran and *K. Chandramouli*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff's case was that she had advanced a loan of Rs. 320 to defendants 1 and 2, and that she subsequently on the same day obtained from them Exhibit A-1, which purported to be a promissory note for that amount. Exhibit A-1, however, could not be relied upon as a promissory note and admitted in evidence as such, because it was insufficiently stamped. The plaintiff therefore laid the suit on the original cause of action, the debt itself, independent of the promissory note. There were, however, endorsements of payment on Exhibit A-1, which were marked as Exhibits A-2, A-3 and A-4. The plaintiff relied on these endorsements of payment to save the claim based on the original cause of action from being barred by limitation.

The learned Subordinate Judge accepted the plaintiff's evidence, that the promissory note in question, Exhibit A-1, was executed as security for the debt subsequently on the date on which the advance of loan was made, and the learned Subordinate Judge upheld the plaintiff's contention, that the suit was maintainable on the original cause of action, the debt, even though Exhibit A-1 was inadmissible in evidence as a promissory note. The learned Judge, however, was of the view that the endorsements Exhibits A-2 to A-4 on which the plaintiff relied, could not save the claim to recover the debt itself from being barred by the law of limitation, as, in the opinion of the learned Judge, Exhibits A-2 to A-4 did not purport to acknowledge the debt itself. The plaintiff's suit was dismissed. The plaintiff seeks to have that judgment set aside in revision.

Learned counsel for the respondents contended that the finding of the learned Subordinate Judge, that the suit itself was maintainable on the original debt, should not be allowed to prevail. He referred to the decision of the Full Bench of this Court in *Perumal Chettiar* v. *Kamakshi Ammal*[1], and tried to bring the present case within the class of cases enumerated at page 943:

> "If the promissory note is itself the consideration for the loan or if it is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the instrument."

I have already pointed out that the learned Judge accepted the plaintiff's oral testimony in this case, that the promissory note was taken not in satisfaction of the debt advanced earlier that day but merely as security for the repayment of the debt. In view of that finding, with which I cannot interfere in exercise of the revisional jurisdiction, the contention of the learned counsel for the respondents has to be rejected. Therefore, the finding of the learned Subordinate Judge, that the suit based upon the original cause of action, the debt itself, is maintainable, stands.

The next question is whether the learned Subordinate Judge's view on the question of limitation was correct. No doubt Exhibits A-2, A-3 and A-4 specifically referred to the promissory note, and there was no express reference to the debt independent of the promissory note. The learned Judge purported to rely on *Ghulam Murtasa* v. *Mt. Fasiunnisa*[2]. But I am unable to see any real scope for extending to the facts of this case the principle laid down there. The learned Subordinate Judge held that in the absence of any evidence of the terms of the endorsement that had to be considered, the principle laid down in *Kondamma* v. *Venkatarayadu*[3], could not apply. In *Kondamma's case*[3], Madhavan Nair, J., applied the principle laid down earlier

1. (1938) 2 M.L.J. 189 : I.L.R. 1938 Mad. 933 (F.B.).
2. A.I.R. 1935 All. 129.
3. (1938) 2 M.L.J. 846.

by a Division Bench of this Court in *Chokkalingam* v. *Annamalai*[1]. Apparently, the learned Subordinate Judge did not refer to *Chokkalingam's case*[1] though it was specifically referred to in *Kondammia's case*[2], In *Chokkalingam* v. *Annamalai*[1], Srinivasa Aiyangar, J., in construing the scope of the acknowledgement relied upon, endorsed in an inadmissible document, observed :

"When it is said that payments were made on account of the chit, it means that payments were made on account of the debt evidenced by the note."

Therefore, in this case when the defendants made payments towards the promissory note, it is obvious that what was paid was towards the debt evidenced by the promissory note, and what was acknowledged successively in Exhibits A-2, A-3 and A-4 was the subsistence of the debt itself, which the parties then believed at the time was evidenced by Exhibit A-2 in the sense, that Exhibit A-1 would be admissible in evidence to prove the existence of the debt itself.

The view taken by the learned Subordinate Judge that Exhibits A-2, A-3 and A-4 did not operate as acknowledgements of the debt itself, is, in my view, erroneous; they did operate as acknowledgments of the debt, to recover which the plaintiff laid the suit. Th suit was, therefore, not barred by limitation.

The next question is what is the decree to which the plaintiff is entitled. Learned counsel for the respondent pointed out that the rate of interest specified in Exhibit A-1, 9 per cent., per annum, could not be allowed to prevail, because independent of Exhibit A-1 there was nothing to show the terms on which the advance was made. Though the plaintiff claimed that 9 per cent., per annum, was the contract rate of interest and the defendants also admitted it, obviously they referred to the rate specified in the contract Exhibit A-1, which itself is inadmissible in evidence. When the terms of the contract have been reduced to writing it may not be permissible to take parole evidence referring the 9 per cent., interest to an antecedent oral contract on the basis of which the loan was advanced. To be permitted to sue on the basis of the original cause of action, the debt is something different from proving the terms of the contract under which that debt was advanced. Parole evidence to prove the terms on which interest has to be paid being inadmissible, the contention of the learned counsel for the respondents is well-founded, that it is independent of the contract that the liability of the defendants to pay interest will have to be decided. It was a loan. Even if the terms of the contract providing for the rate of interest be inadmissible in evidence, the defendants were certainly liable to pay interest under the Interest Act, and the plaintiff should be held entitled at least to 6 per cent. interest from the date of the loan.

The plaintiff will, therefore, be entitled to a decree for the receovery of the principal amount with interest thereon at 6 per cent. per annum, after giving credit to the payments endorsed. The plaintiff will be entitled to proportionate costs in the suit. She will also be entitled to the costs of the proceedings in Revision.

V.S. *Petition allowed.*

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1. 34 I.C. 417 : A.I.R. 1917 Mad. 460.
2. (1938) 2 M.L.J. 846.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

R. Ganapathy Goundar .. *Petitioner**

v.

The State of Madras by Collector of Salem and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11—*Directly and substantially in issue—Identity of issue—Necessity—Cause of action arising subsequent to former suit or proceeding—If could be in issue in former proceeding—Second proceeding*—Res judicata.

For the principle of *res judicata* to apply, there should be an identity of issues to be tried and the issue must have been decided on the merits in the previous proceedings. Where the title put forward in the second proceedings could not be and was not in issue at the stage of the first proceeding, there could be no identity of issues arising for decision. There can be no *res judicata* regarding a cause of action that has arisen subsequent to the previous proceeding. The bar arises only where the issue has been directly and substantially raised in a former suit or proceeding. When there was no cause of action no matter of the litigation can be said to be directly and substantially in issue in the former suit or proceeding.

Wahidan v. *Aliman*, A.I.R. 1929 All. 844, followed.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 562 of 1957 on the file of the High Court, the High Court will be pleased to issue writs of *certiorari* calling for the records in A.S. No. 334 to 337 of 1956 on the file of the Estates Abolition Tribunal, Vellore, the 2nd Respondent herein and quash the orders, dated 26th February, 1957, made therein.

V. Vedantachari, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondents.

The Court made the following

ORDER.—These petitions are by the same petitioner and seek the quashing of the orders of the Estates Abolition Tribunal, Vellore, by the issue of a writ of *certiorari* in four appeals preferred by him to it, namely, A.S. Nos. 334 to 337 of 1956. These four appeals were dismissed by a common order and it is therefore not necessary to deal with each of the petitions separately. The petitioner is the landholder of Kokkarayanpettai zamin estate in Salem district, and he made four applications Nos. 17 of 1951, 24 of 1951, 25 of 1951 and 29 of 1951 to the Assistant Settlement Officer, Pudukottah, for the issue of ryotwari patta to him for certain items of lands in the four hamlets of the estate claiming them as his private land. These applications were dismissed by the Assistant Settlement Officer two on 28th February, 1952 and the other two on 28th April, 1952, for the reason that the lands for which patta had been applied had stood registered in the name of his son and that by reason of this fact the petitioner was not entitled to make any application for patta. There is no doubt that this order of the Assistant Settlement Officer was correct. It was, therefore, not naturally taken up in appeal. The lands for which patta was applied for stood registered in the name of the petitioner's undivided son. Subsequent to the dismissal of these applications for ryotwari patta there was a registered partition in the family under which the items of land for which the petitioner had previously made applications for patta fell to the share of the petitioner himself. When the petitioner thus obtained title in these items of lands he made another set of applications to the Assistant Settlement Officer basing his right to patta on the allotment of the items under the partition. The Assistant Settlement Officer, however, held that the previous order disallowing the petitioner's claim on the ground of lack of title barred the present application on the principle of *res judicata* and therefore, dismissed the application. From these orders the petitioner preferred appeals to the Tribunal whose numbers I have quoted earlier and the Tribunal confirmed the

* W.P. No. 562 to 565 of 1957. 21st August, 1959.

dismissal on the same reasoning, namely, that the present applications were barred by *res judicata*.

It is clear that the Tribunal fell into an error in rejecting the applications on the grounds stated by them. For the principle of *res judicata* to apply there must be an identity of issue to be tried and the issue must have been decided on the merits in the previous proceedings. The previous aplications had been dismissed on the ground of want of title. The title now put forward could not be in issue at the stage of the first application and therefore there is no identity of the issues arising for decision. No doubt the previous order had become final but it became final on the question that on that date the petitioner had no title to apply for ryotwari patta. If by reason of a subsequent act namely, the partition in the family he obtains title there could be no question of *res judicata* which would prevent the assertion of the newly acquired title. The petitioner did not possess title which he now alleges and on the basis of which he now seeks relief. In a case so simple and elementary as this it appears to me that it is needless to cite authority but nothing is better settled in law as to *res judicata* as that there can be no *res judicata* regarding a cause of action that has arisen subsequent to the previous suit. Where a previous suit was dismissed because it did not disclose any cause of action and later another suit was filed after the plaintiff had a cause of action and a plea of *res judicata* was raised, a learned Judge of the Allahabad High Court observed in *Wahidan* v. *Aliman*[1]:

"Under section 11 of the Civil Procedure Code the bar arises only where the issue has been directly and substantially raised in a former suit. When there was no cause of action no matter of the plaint can be said to be directly and substantially in issue in the former suit".

It is clear that the orders of the Tribunal cannot stand and are, therefore, set aside, the rules being made absolute. The Tribunal will restore the appeals to their file and proceed with them in accordance with law, if necessary, by remanding the proceedings to the Assistant Settlement Officer for proceeding with the applications under section 15 of the Abolition Act. There will be no order as to costs.

Order set aside: Rule made absolute.

P.R.N.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

The State of Madras by Special Deputy Collector, Tiruchirapalli .. *Appellant**

v.

S. Mohamed Ibrahim and others .. *Respondents.*

Land Acquisition Act (I of 1894), section 23—Acquisition of house property in a municipal area—Principles in determining compensation—Market value—How determined—Amending Act Madras Act XII of 1953—Interest payable is four per cent., only.

For house property acquired under the Land Acquisition Act the compensation payable by the Government should mainly be assessed with reference to the net annual income of the property. Where such property is actually leased to a tenant, the rent furnishes adequate evidence for arriving at the annual income. The tax payable in respect of the property and a month's rent for repairs should be deducted from the gross annual income. The market value of house property in a municipal area is arrived at by multiplying the net annual income by the number yielded by dividing 100 by the rate of interest current at the time of notification on gilt-edged securities. To this figure fifteen per cent., will be added as solatium.

It is wrong in such a case to attempt to value the site and the superstructure separately and add both the figures. The house property should be valued as a single unit.

Interest should have been allowed on the compensation only at the rate of four per cent. and not at six per cent.

Appeal against the decree of the Court of the Subordinate Judge of Tiruchirapalli in Original Petition No. 26 of 1954.

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1. A.I.R. 1929 All. 844.

*Appeal No. 341 of 1956. 17th September, 1959.

The Government Pleader (*K. Veeraswami*), for Appellant.

S. K. Ahmed Meeran and *M. Jamaal Mohamed*, for Respondents.

The Court delivered the following

JUDGMENT.—For house property acquired under the Land Acquisition Act, the compensation payable by the Government should be mainly assessed with reference to the net annual income of the property. For arriving at the annual income, where such house property is actually leased to a tenant who is regularly paying the rent stipulated, the rent furnishes adequate evidence. It is wrong in such a case to attempt to value the site, independently of the superstructure and then value the superstructure as a separate unit and add the one value to the other with a view to arrive at the compensation payable to the owner of the property. The site and the structure cease to be capable of yielding separate items of income. The house property is enjoyed as a unit by the owner or by the lessee. The method adopted by the Land Acquisition Officer in valuing the site and the superstructure separately and then adding the values for the purpose of arriving at the compensation payable was wrong. The learned Subordinate Judge was right in holding that the house property, inclusive of the site and the superstructure should be valued as a single unit.

The house property had been leased to a tenant. He was regularly paying the rent stipulated, namely, Rs. 32 a month. The gross annual income of the property was Rs. 384. From the gross annual income, the tax payable has to be deducted. In deducting the tax payable, the learned Subordinate Judge considered that Rs. 50-9-3 was the half-yearly tax. That was the half-yearly tax until the end of September, 1952. The notification under the Land Acquisition Act relating to this property was issued in October, 1952. The tax payable for the half-year 1952-53 was not, Rs. 50-9-3, but Rs. 41-7-0. The Subordinate Judge should have deducted from the gross value not twice Rs. 50-9-3, but twice Rs. 41-7-0, namely, Rs. 82-14-0, on account of tax. The Subordinate Judge deducted Rs. 32 on account of expenses of minor repairs. That is correct. The net annual income is thus Rs. 384 minus Rs. 82-14-0 minus Rs. 32.

In regard to house-property in a municipal area, the market value is arrived at by multiplying the net annual income by the number yielded by dividing 100 by the rate of interest current at the time of the notification on gilt-edged securities: (Vide *Collector of Kistna* v. *Sivarama Prasad*[1]. That principle was approved in *Radhakrishna* v. *Province of Madras*[2]. In *Collector of Kistna* v. *Sivarama Prasad*[1], the actual return on gilt-edged securities at the time of the notification was $3\frac{1}{2}$ per cent. The District Judge had capitalised the rental at 30 years' purchase. 100 divided by $3\frac{1}{2}$ per cent., is $28\frac{4}{7}$. This Court considered it unnecessary to interfere with the District Judge's order adopting " 30 years' purchase ". In the case now under appeal, the Subordinate Judge has multiplied the net annual income by the precise figure of $28\frac{4}{7}$ which is the result of dividing 100 by $3\frac{1}{2}$. There is, therefore, no reason to alter the number of years ' purchase adopted by the Subordinate Judge. Instead of multiplying Rs. 250-13-6 by $28\frac{4}{7}$, Rs. 384 minus Rs. 114-14-0 will be multiplied by $28\frac{4}{7}$. To that figure, 15 per cent. will be added as solatium. In the place of the sum awarded by the learned Subordinate Judge, the sum arrived at on the basis stated above will be substituted. To that extent, the memorandum of cross-objections is allowed.

As regards the appeal, the interest which the Subordinate Judge should have allowed was 4 per cent., per annum, from 12th January, 1954, and not 6 per cent. (see Madras Act XII of 1953). To that extent, the appeal is allowed. The parties will bear their own costs in the appeal and the memorandum of objections.

V.S. ——— *Orders accordingly.*

1. (1937) 2 M.L.J. 744 : A.I.R. 1938 Mad.
2. (1948) 2 M.L.J. 159 : I.L.R. (1949) Mad. 497 : A.I.R. 1949 Mad. 171.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Commissioner of Income-Tax, Madras .. *Applicant**

v.

Sri Rama Vilas Service (Private) Ltd., Madras .. *Respondent.*

Income-tax Act (XI of 1922), *sections* 10 (5), 10 (2) (vi) (a) *and* (b)—'*Machinery installed*'—*If would include lorries and buses—Right to development rebate in respect of such vehicles.*

The word ' installed ' in relation to any machinery or plant must be construed to mean such an installation as that plant or machinery is capable of. A bus or lorry purchased by an assessee and put on road in the course of the business which he carried on, will certainly satisfy the test of installation of such vehicles, which are also ' plant ' within the meaning of section 10 (5) of the Income-tax Act. The expression 'plant or machinery installed ', should be given the same meaning in both sub-clauses (*a*) and (*b*) of section 10 (2) (vi) of the Act. The word ' installed ' has to be given its normal meaning and does not necessarily connote something fixed to the earth or immoveable. Hence an assessee will be entitled to claim development rebate in respect of such vehicles.

Commissioner of Income-tax, Bombay v. *Saraspur Mills Ltd.*, (1959) 36 I.T.R. 580, followed.

Case referred to the High Court by the Income-Tax Appellate Tribunal, Madras Bench ' A ' under section 66 (1) of the Indian Income-tax Act, (XI of 1922), in R.A. No. 935 of 1957-58 on its file for decision on the following question of law, *viz.* :—

"Whether the buses and lorries are plant and machinery "installed" and whether development rebate under section 10 (2) (vi-*b*) of the Income-tax Act is allowable on buses and lorries ?".

C. S. Rama Rao Sahib, Special Counsel for the Income-tax for Applicant.

V. Sethuraman, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The question referred to this Court under section 66 (1) of the Indian Income-tax Act ran :

" Whether the buses and lorries are plant and machinery "installed" and whether development rebate under section 10 (2) (vi-*b*) of the Income-tax Act is allowable on buses and lorries ? "

That question was answered in favour of the assessee by the Tribunal, and the question of law was referred to this Court at the instance of the department.

Section 10 (2) (vi) (*a*) provides for what is called an extra-initial depreciation, and that applies to machinery or plant, being new, which has been installed after the 31st day of March, 1948. Section 10 (2) (vi) (*b*) provides for a further relief to the tax-payer, and what was called a development rebate has been granted in the case of new machinery or plant installed after the 31st day of March, 1954. The word ' plant ' itself was given a statutory definition in section 10 (5) of the Act. ' Plant ' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purpose of the business, profession or vocation.

It should be clear that the expression 'plant or machinery installed' should be given the same meaning both in section 10 (2) (vi) (*a*) and section 10 (2) (vi) (*b*). That the buses and lorries come within the scope of the statutory expression ' plant ' is not disputed. What the learned counsel for the department urged was that in the case of buses and lorries the further requirement of section 10 (2) (vi) (*b*), that they should be ' installed ' before the development rebate is allowable, has not been satisfied. The word ' installed ' itself has not been statutorily defined. In view of the extended statutory definition of the word ' plant ' in section 10 (5) of the Act, it seems clear to us that the word ' installed ' in relation to the machinery or plant, must be construed to mean such installation as that plant is capable of. The Assistant Commissioner referred to the dictionary meaning of the word ' installed ' as

*Tax Case No. 68 of 1958. 26th October, 1959.

given in Webster's New International English Dictionary

"to set up or fix in position for use or service as to instal a heating or lighting system".

The Shorter Oxford Dictionary in English gives as one of the meanings

"to place an apparatus, a system of lighting, heating, or like in position for service or use".

Much the same meaning is given in Funk and Wagnall's New Standard Dictionary

"to place in position for service or use, as to instal hot water system".

Putting aside the examples given in the dictionary meaning to explain the scope of the word 'installed', 'installed' would certainly mean 'to place an apparatus in position for service, or use'. As we said, that a bus or a lorry is a plant within the meaning of section 10 (2) (vi) (*b*) cannot and does not admit of any doubt. The only other question is whether, when a bus or a lorry is purchased and is also put on the road in the course of the business that the assessee carried on, it could be said that the requirement of installation has been satisfied. That the bus or lorry has been set up for use or service when it is put on the road seems clear to us and in that sense buses or lorries were installed. The statutory test of installation was satisfied by the assessee because such installation as the buses and lorries were capable of was completed.

The learned counsel for the department urged that the requirement of installation with reference to plant and machinery could not possibly be satisfied by a bus or a lorry. Learned counsel could not support an extreme contention, that installation necessarily meant something fixed to earth and thereby becoming immovable. When we pointed out that a mobile van with movable machinery for carrying out the repairs in the case of a bus operator was a familiar example and any machinery purchased and used for such a mobile unit would be machinery 'installed', learned counsel could not challenge that position. That is why we said the word 'installed' has to be given its normal meaning and with reference to a given plant or a machinery we have got to see whether such installation as that machinery is capable of has been achieved. That test, in our opinion, was satisfied by the assessee when he put the buses and lorries on the road, that is, when his 'plant or machinery' was set up for service.

We find that the Bombay High Court has taken a similar view in *Commissioner of Income-tax, Bombay* v. *Saraspur Mills, Ltd*[1]. We respectfully agree with the principle of interpretation laid down by the Bombay High Court in that case.

The question referred to this Court is answered in the affirmative and in favour of the assessee. As the department has failed, it will pay the costs of the assessee. Counsel's fee Rs. 250.

R.M. ——— *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ANANTANARAYANAN.

Logambal Achi .. *Appellant**

v.

Muthia Pillai and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 18—Costs in suits for recovery of a debt due by an agriculturist filed after the appointed day—Effect of scaling down due to amendment.

In any suit filed after the 1st October, 1937, as provided under section 18 of the Madras Agriculturists Relief Act, even though the suit might have been instituted for the proper amount as per the provisions of the Act as it then stood, if the ultimate scaled down amount for which the decree is passed is different, due to amendment of the Act subsequently, the plaintiff will be entitled to costs only on the basis of the scaled down debt. There is no discretion in the Court to import equitable considerations in matters like this.

Vemireddi Ranga Reddi v. *Venkata Reddi*, (1942) 2 M.L.J 592, explained.

1. (1959) 36 I.T.R. 580.

*Appeals Nos. 336 and 473 of 1956. 24th October, 1959.
(2nd Kartika, 1881, Saka)

All that can be said is that further amendment of section 18 (1) of Act (IV of 1938), which would enable a litigant to recover scale of costs on amount as on the date of filing of suit and not with reference to future changes of the Act, would appear to be in the interests of justice and equity.

Appeals against the decree of the Court of the Subordinate Judge of Cuddalore, dated 9th March, 1956, in O.S. No. 65 of 1943.

T. Muniswami Reddi, for Appellant in Appeal No. 336 of 1956 and for Respondent in Appeal No. 473 of 1956.

J. R. Gundappa Rao, for Respondent in Appeal No. 336 of 1956 and for Appellant in Appeal No. 473 of 1956.

The Court delivered the following

JUDGMENT.—These are related appeals from the judgment of the learned Principal Subordinate Judge of Cuddalore, in O.S. No. 65 of 1943, which was a suit remanded by this Court for recovery of the balance of principal and interest due upon a promissory note executed on 1st November, 1937. In A.S. No. 336 of 1956, the appellant is the second plaintiff in the suit. In A.S. No. 473 of 1956, the appellants are defendants 2 to 5 in the Court below.

The point raised in the main appeal (A.S. No. 336 of 1956) is a simple one ; The plaintiff originally instituted the suit after reduction of the debt in accordance with the provisions of Madras Act IV of 1938, as it then stood. There was a decree and an appeal to this Court, and in this Court the decree and judgment of the lower Court were set aside, and the suit was remanded for disposal in accordance with the directions of this Court. The learned Subordinate Judge has finally awarded costs to the plaintiffs under section 18 (1) of Madras Act IV of 1938, since the suit was admittedly instituted after 1st October, 1937, upon the scale or proportion of the debt as ultimately scaled down. What is now urged is that this is a hardship, and that, since the plaintiffs are not blameable in respect of the amount for which they filed the suit in accordance with Madras Act IV of 1938 as it then stood, they ought not to be awarded any reduced costs, simply because the subsequent amendments to the Act have affected the amount of the decree.

The point would have some substance, but for the explicit and clear requirements of section 18 (1) of the Act. In *Vemireddi Rangareddi* v. *Venkata Reddi*[1], a Bench of this Court had to deal, *inter alia*, with this matter of costs, and the learned Judges observed as follows :

"Under the provisions of section 18, when a suit is filed after 1st October, 1937, the Court must allow costs on the basis of the debt as scaled down. The corollary of this provision of law, is that when a suit is filed before 1st October, 1937, costs should legitimately be allowed on the basis of the decree which would have been passed, had it not been for the intervention of Act IV of 1938 ".

But this principle cannot be stretched further, to negate or nullify the explicit provisions of sections 18 (1) which the Legislature has thought fit to enact. In any suit filed after 1st October, 1937, even though the suit might have been instituted for the proper amount as the provisions of Madras Act IV of 1938 then stood, if the ultimate scaled down amount for which the decree is passed is different, owing to the intervention of statutory amendments, the plaintiff will only be entitled to costs on the basis of the scaled down decree. There is no discretion in a Court administering a provision of this character, to import equitable considerations which would do violence to the plain language and purport of the section. I, therefore, find that the lower Court was right, and that this ground of objection must fail. Further, there is even ground to indicate that, with regard to certain of the amendments at least, the Legislature really intended them to be retrospective in their effect. All that can be suggested here is that a further amendment of section 18 (1) of Act IV of 1938 which would enable a litigant to obtain the scale of costs with reference to the provisions of the Act applicable at the time when he instituted the suit, and not with reference to future changes of the Act which could not be predicted or prophesied by any party, would appear to be in the interests of justice and equity.

1. (1942) 2 M.L.J. 592.

With these observations, the appeal is dismissed. With regard to the related appeal (A.S. No. 473 of 1956) by defendants 2 to 5 this concerns two alleged further payments, namely Rs. 220-5-9 towards Exhibit B-5 and Rs. 60-11-3 towards Exhibit A-2. As the lower Court points out, these payments were not alleged at any stage prior to the arguments in the suit, and were not claimed in the pleadings. Further, they are not supported by any direct evidence, or by any of the accounts or other portions of the record. They are sought to be substantiated on the circumstantial evidence of the sums in renewal being less than the sums for which such renewals ought to have been made, if these payments had not really occurred. But, obviously, the facts are equally capable of another inference, that there was concession to this extent as between the parties.

The related appeal, A.S. No. 473 of 1956 is also seen to be lacking in merits, and both the appeals are hereby dismissed. The parties will bear their own costs.

R.M. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

P. E. Rubalingam .. *Petitioner**

v.

The State of Madras, by Collector of Madras .. *Respondent.*

Constitution of India (1950), *Article 226—Applicability—Breach of contract—Contract entered into between Government and private party—Termination by Government without inquiry—Application for writ of* certiorari *—Competency—Natural justice.*

A mere breach of contract is not remediable by a high prerogative writ such as *certiorari.* The mere fact that one of the parties to the contract happens to be a Government officer, namely, the Collector of a District does not make any difference. When there is no statutory or other legal right to the continuance of a contract entered into with a party the termination of such a contract by the Government without inquiry, would not entitle that party to move the High Court under Article 226 on the ground of violation of the principles of natural justice.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in H-4/26482/59, dated 28th September, 1959, on the file of the Collector of Madras and to quash the said order.

K. S. Ramamurthi and *T. R. Mani*, for the Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondent.

The Court made the following

ORDER.—The Collector of Madras availed himself of the services of the petitioner to sell rice to the public at fair price. The machinery utilised was that an agreement was entered into between the petitioner and the Collector whereunder the petitioner agreed to purchase stated quantitites of rice from the Collector and to sell it to the public at prices fixed by him. While the agreement of this sort was in force, the Collector cancelled and terminated the agreement. It is stated that he did so without any enquiry as to the misconduct which he alleged against the petitioner and without affording him an opportunity to show cause. As these facts are admitted, it would follow that if the petitioner had a statutory or other legal right to the continuance of the contract, its termination in such circumstances would entitle him to move this Court under Article 226.

The question, however, is whether the question of violation of the principles of natural justice would be attracted to a case, where the act of the Government amounts merely to a breach of contract. The agreement in question was not under any statute, and the petitioner had no right in law, apart from the agreement to purchase rice from the Government, nor were the Government bound, again, apart from contract, to sell rice to him. Of course as incidental to and as part and parcel

* W.P. No. 895 of 1959. 25th November 1959.
(4th Agrahayana 1881, Saka.)

of this sale the Government stipulated for re-sale at a price fixed and this they could stipulate to apart from any Statute—under the ordinary law. Does the mere fact therefore that the seller of the rice happens to be the Collector take the case out of the rule of law that a mere breach of contract is not remediable by a high prerogative right. In my opinion the answer can only be in the negative. The analogy is furnished by the decision relating to the licences granted for running business—or for import or export. Apart from Statute, they might involve questions of Article 19. But here as I said earlier the petitioner had no legal right to insist on the supply of rice for purposes of his business by the Government and that should decide. The petition fails and is dismissed. No costs.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Kothanda Naidu and others .. *Appellants**

v.

M. Kuppayya Naidu and another .. *Respondents.*

Hindu Law—Debts—Father—Liability of sons for debts incurred by father—Plea of Avyavaharika—Burden and extent of proof.

Where Hindu sons challenge debts incurred by their father as not binding on them on the ground of their being avyavaharika or immoral debts, the burden is theirs to prove by evidence that their father indulged in vices and led an immoral life and that the debts were tainted in the sense that direct connection was apparent between them and certain immoral purposes relating to the private life of the father. The burden is not discharged by showing that the father lived an extravagant or immoral life ; there must be a direct connection established between the debts and the immorality set up.

Appeal against the Decree of the Court of the Subordinate Judge of Vellore in O.S. No. 70 of 1954.

A. Seshachari and *A. Srinivasan*, for Appellants.

B. C. Seshachalam and *J. Nagarajan*, for second Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is an appeal instituted *in forma pauperis* by the plaintiffs in the lower Court (minors represented by their next friend) against the judgment and decree of the learned Subordinate Judge of Vellore, granting a preliminary decree for partition and making provision for the payment of certain debts binding upon these minor coparceners. It is sufficient here to state that the plaintiffs are the minor sons of the first defendant, that the first defendant was adjudged an insolvent in I.P. No. 10 of 1953 and that the second defendant is the Official Receiver, North Arcot, representing the estate in insolvency.

The main contention of the appellants with regard to the debts proved in suit, for which provision was made by the Court in passing the preliminary partition decree, was that their father (first defendant) led a reckless, improvident and immoral life and that these debts are clearly *avyavaharika* debts not binding on the appellants. We think it is sufficient for us to state that there was not an iota of evidence adduced at the trial to prove either that the first defendant led an immoral life, or that the debts were tainted, in the sense that some connection was apparent between them and certain immoral purposes relating to the private life of the father (the first defendant). On the contrary, upon a scrutiny of the evidence, the learned Subordinate Judge himself observes that the witnesses examined on behalf of the defendants had something to say against the wisdom or prudence of the first defendant as a man of business. But " all of them agreed that he is good family man ".

We think it is sufficient here to set forth the relevant passage from Mulla' Principles of Hindu Law, twelfth edition (1959), page 455, section 295 (2) :

* Appeal No. 446 of 1956. 9th November, 1959.

"The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection between the debt and immorality set up by the sons".

The learned author supports this dictum by very many citations of case-law of all the High Courts, which we do not think it necessary to reproduce here, since the principle itself is very well-known[1].

In the present case even apart from the fact that no such connection was established it is not even proved that the father led any immoral life, or that he indulged in vices which led him to extravagance. This ground of appeal must consequently fail in entirety.

It is now further urged before us that the statement filed by the Official Receiver does not make specific reference to two debts, which are not decree debts, and which might have been time-barred for all that the minor plaintiffs (appellants) know. Firstly, we do not think that it is open to persons in the position of the appellants (minor plaintiffs) to plead minority as an excuse for ignorance upon essential matters, upon which they should have necessarily gathered full particulars before litigating in Courts of law. While minors have certain rights in law protecting them, where the burden lies upon them to allege and establish certain facts, that burden is not lessened by virtue of mere minority, so long as they are parties to the suit. Next, even apart from this, we have not the slightest ground for assuming that these two debts were time-barred on the date of the presentation of the petition for adjudication in insolvency, which is admittedly the relevant date. Again, we have not the slightest ground for the presumption that the Official Receiver has improperly admitted these debts, when they were so time-barred on the relevant date. If that is actually a fact the appellants are perfectly at liberty, under the provisions of the Provincial Insolvency Act, to agitate for expunging these time-barred debts from the schedule, in appropriate proceedings.

The appeal fails and is dismissed with costs. The Court-fee due to Government will be recovered from the appellants.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

RM. P. M. Ranganathan Chettiar .. *Petitioner*.*

Civil Procedure Code (V of 1908), sections 2 (2), 96 and 115—Applicability—Connected suits—Decree in one—Condition that on the other suit being decreed, decree in former to become joint decree in favour of plaintiff in latter suit—Clause directing decree not to be executed till disposal of other suit—If "decree"—Remedy—Appeal or Revision.

Where in one of two suits between the same parties, a decree is made with a condition that if the plaintiff in the other suit succeeded, the present decree would become a joint decree in favour of the plaintiff in the other suit, and by a separate clause in the decree the interests of the other plaintiff is safeguarded by directing that the decree now passed will not be executed till the disposal of the other suit, the direction in the decree amounts to a "decree" as defined by section 2 (2), Civil Procedure Code, and cannot be construed as a mere order postponing execution. The remedy of the party aggrieved by such a direction is an appeal from the decree and not a Civil Revision Petition under section 115, Civil Peocedure Code.

Petition sought to be presented under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Devakottai, dated 27th January, 1959 and made in O.S. No. 32 of 1958.

1. See the discussion of what constitutes illegal or immoral debts in P. V. Kane, History of Dharmasastra, Vol. III, pages 446-448 (all Sanskrit Texts reviewed); and Mayne on Hindu Law and usage, Eleventh edition, page 404 and foll; T. P. Gopalakrishnan, Hindu Law (1959-page 178 and foll.).

* Stamp Register No. 26075 of 1959.

16th December, 1959.
(25th Agrahayana, 1881—Saka.)

Office note placing the matter for orders before the Court.—This is submitted for consideration as to whether an Appeal or Revision is competent in the following circumstances:—

S. R. No. 26075 is a Civil Revision Petition sought to be presented to the High Court, against the decree in O.S. No. 32 of 1958, Sub-Court, Devakottai. That suit for the recovery of a sum of Rs. 15,047-10-6 due under a pronote, dated 18th June, 1956, executed in favour of one Somasundaram Chettiar, the father of the plaintiff by the first defendant as the manager of the joint family. The 2nd defendant is the son of the 1st defendant by his deceased first wife Rajammal and defendants 3 to 5 are the sons by the 2nd wife. The plaintiff and the said deceased Rajammal were the children of the said Somasundaram Chettiar, who died on 1st December, 1957. The suit was filed by the plaintiff as the sole heir of Somadundaram Chettiar. Pending the suit the first defendant died and defendants 2 to 5 were brought on records as his legal representatives. The 2nd defendant has filed a partition suit earlier, that is O.S. No. 1 of 1958 on the file of the same Sub-Court, Devakottai, for partition and separate possession of ¼th share in the properties of the estate of the late Somasundarm Chettiar, including the suit promissory note, alleging that he has become entitled to that share under the Hindu Succession Act (XXX of 1956). This is also referred to in the plaint of the present suit O.S. No. 32 of 1958 wherein the plaintiff has stated that the prior partition suit need not be an impediment to this suit, and that, it may be decreed, if necessary, by safeguarding the interests of the 2nd defendant in case his claim for partition was upheld. The defendants 2 to 5 had also filed I.A. No. 918 of 1958 for stay of trial of the suit under sections 10 and 151, Civil Procedure Code, till the disposal of O.S. No. 1 of 1958. In the counter in this I.A. also, the plaintiff reiterated that the suit need not be stayed, but, the interests of the 2nd defendant may be safeguarded. On this the I.A. No. 918 of 1958 was dismissed and after trial of the suit, a conditional decree for Rs. 13,592-10-9 with subsequent interests and costs was passed.

By clause 3 of the decree, it was held, that if the 2nd defendant succeeds in O.S. No. 1 of 1958, the present decree will become a joint decree in favour of the 2nd defendant, he being entitled to a share. By clause (2) of the decree, the interests of the 2nd defendant was safeguarded by directing that the decree, will not be executed till the disposal of O.S. No. 1 of 1958.

Against this direction of stay of execution under clause (2) of the decree, the present Civil Revision Petition is sought to be presented. An objection was raised by the Office that a Civil Revision Petition does not appear to be a proper remedy and that an appeal only lies. It was pointed out, that the decree passed was not an absolute decree in favour of the plaintiff but was a qualifed one based on the finding on several issues framed in the suit and on the consent of the plaintiff for safeguarding the interests of the 2nd defendant. Relying on the principles of the decisions in *Brij Mohan Lal* v. *Saratji Singh*[1]; *Zapar Ali* v. *Amir Shah*[2], it was further pointed, that an appeal against the finding of the lower Court appears to be the proper remedy and hat if the subject-matter of the appeal is incapable of valuation, it should be valued under section 50 of Act XIV of 1955 corresponding to Article 17-B of Schedule II of the old Act. Kind attention is solicited to the orders, dated 3rd November, 1953, in S.R. No. 33938 of 1953 (Appeal No. 1216 of 1953) and, dated 17th November, 1953, on S.R. No. 37005 (Appeal No. 1299 of 1953) on this point.

The advocate states that as he is aggrieved only against the direction in clause (2) staying the execution of the decree till the disposal of O.S. No. 1 of 1958, a Civil Revision Petition only lies and desires that this may be posted for order of Court. He relies on the decision of *K. G. Rangaswami Chettiar & Co. and others* v. *K. R. Eswaramurthi Gounder*[3]. That decision appears to have no bearing on the facts of the present suit. It relates to a question of maintainability of a Letters Patent Appeal against the order of the single Judge of the High Court in a C.M.P. refusing to stay

1. A.I.R. 1937 Oudh 513.
2. A.I.R. 1933 Lah. 678 (2).
3. (1954) 2 M.L.J. 520.

the execution of a decree of the lower Court and as to whether that order can be construed as a judgment under clause (15) of the Letters Patent. Therefore, the authority cited by the advocate, does not appear to apply to the facts of the present case.

In *Kasi* alias *Alagappa Chettiar* v. *RM. AR. M. V. Ramanathan Chettiar* alias *Srinivasan Chettiar* through his next friend *AV. PL. CT. Ramanathan Chettiar and others*[1] it was held that the mere fact that the Court which passed the decree, took the view that only findings and directions had been given will not affect the question of appealability. The question whether an adjudication is a decree or not must be determined with reference to section 2 (2) of the Civil Revision Petition and not with reference to its implication, true or supposed arising from the general provisions relating to judgments and decrees to disposal of suits. The view expressed in the Full Bench decision in *Baliram Ganpatrao* v. *Manohar Damodhar*[2], was also discussed but was dissented from. In the above circumstances, it is submitted for consideration, as to whether the direction contained in the 2nd clause of the decree of the lower Court does not fall under section 2 (2) of the Civil Procedure Code and as to whether an appeal or a revision is competent in this case.

R. Kesava Ayyangar, for Petitioner.

The Court made the following

ORDER.—In my opinion the remedy of the appellant is only to file an appeal against the decree on the terms of which he says he has got a grievance. Clause (2) of the decree cannot be construed as a mere order postponing execution. Civil Revision Petition cannot be entertained.

P.R.N. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

PARVATHI AMMAL .. *Appellant**

Penal Code (*XLV of* 1860), *sections* 84, 302 *and* 309—*Applicability—Murder by woman of children and attempt to commit suicide by drowning—Accused in straitened circumstances and suffering from fits of mental depression—Offence—Sentence—Remission—Criminal Procedure Code* (*V of* 1898), *section* 401—*Applicability—Case if fit for recommendation for remission of sentence.*

Where a woman accused commits the crime of murder of her young children and attempts to commit suicide by drowning, owning to poverty and ill-health—mental as well as physical—and there is evidence to show that she was suffering from periodical fits of depression or mental confusion, but there is nothing to show that at the time of committing the offences the accused, by reason of unsoundness of mind, was incapable of knowing the nature of her acts or that those acts were wrong or contrary to law, section 84, Indian Penal Code, cannot be availed of, and the accused has to be convicted under sections 302 and 309, Indian Penal Code and sentenced. But, in view of the poverty and ill-health, it would be an appropriate case for recommendation to the Government under section 401, Criminal Procedure Code, for remission of the sentences and for further proper directions.

[Recommendation made for reduction of sentence of rigorous imprisonment for life to one for three years and for detention of the accused for the reduced period in the Madras Sevasadhan in accordance with G.O. M.S. No. 222, dated 20th January, 1931.]

Appeal against the Judgment of the Additional Sessions Judge of the Court of Sessions of the Ramanathapuram Division at Madurai, in Case No. 240 of the Calendar for 1958.

V. C. Srikumar (*amicus curiae*) appointed under Rule 242 of Criminal Rules of Practice and Orders, 1958, to argue the case and of

Miss T.A. Bhyme, for the Public Prosecutor (*P. S. Kailasam*), on behalf of the State.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This appellant, Parvathi Ammal, has been convicted by the learned Additional Sessions Judge of Ramanathapuram Division at Madurai, of offences under sections 302, Indian Penal Code (three counts) and 309, Indian Penal Code and sentenced to undergo imprisonment for life upon the charge of murder

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1. (1947) 2 M.L.J. 523. 2. I.L.R. (1943) Nag. 241 (F.B.).

* Crl. Appeal No. 307 of 1959. 21st September, 1959.

and simple imprisonent for six months under section 309, Indian Penal Code, the sentences to run concurrently. Further, the learned Judge has made a recommendation under section 401, Criminal Procedure Code, that the Government might be pleased to commute the sentence to rigorous imprisonment for three years.

The facts are very clearly established in evidence, and have throughout been admitted by the accused. The accused was married to one Sevugan (P.W. 1) as his third wife, and these people were residing at Sillampatti Village in Tirupattur Taluk. The accused and Sevugan (P.W. 1) had four children, of which the eldest was a daughter named Chinthamani, and the others were respectively a daughter Chittu (aged 5), a daughter Papal (aged 3) and a boy (aged 1½). The evidence shows that about 10 years previous to these offences, the earning member of the family (P.W. 1) was disabled by dacoits, while sleeping at his sheep pen. The result of this accident was that the entire burden of supporting this family fell on the accused. The evidence very clearly proves that these people were in strained circumstances, and the accused seems to have suffered from fits of depression or mental confusion off and on. On 2nd November, 1958, when Sevugan (P.W. 1) left the house at about 9 A.M. to proceed to a *shandi*, the accused and her children were taking their food. But before leaving the house, P.W. 1 asked the eldest daughter, Chinthamani, to proceed elsewhere, and she was not in the house when the tragedy actually occurred.

The rest of the evidence relating to these offences is given by certain neighbours who live in this locality. Thus, Chellammal (P.W. 2) states that there is a well in the land of one Mayalagu in the village, which has a parapet wall of about one foot in height. P.W. 2 heard some cries from this well, at a distance of about 10 to 12 feet from the well, and peeping inside found the accused and the two children, Pappal and Chelliah, struggling in the water. She raised an alarm, and Subbiah (P.W. 3) came to the rescue, as well as Palani (P.W. 6), a villager residing about two furlongs from this village in another village. These persons used a spade, and first lifted up one of the children, namely, the boy Chelliah. P.W. 6 and another villager took Pappal out of the well in the same way, and finally the accused was rescued. All the three victims were alive, but unconscious. An attempt was made to revive them by putting them on a cart wheel and rotating the wheel. Finally, they were able to revive the accused to consciousness. But the two children, Pappal and Chelliah, succumbed in spite of the best efforts of these villagers at restoration.

P. W. 1 returned from the *shandi* that evening, and learnt of the tragedy. The other daughter, Chintamani, was also missing, and her dead body was taken out of the well only the next day, when it floated to the surface. The first report given by P.W. 1 (Exhibit P-1) was recorded by P.W. 9, the village Headman of Nedumaram Village. Investigation followed upon his *yadast*. The subsequent facts of investigation are not of great importance in this case. But the evidence clearly proves that all the three children died of asphyxia due to drowning, and this is spoken to by Dr. Barkathullah (P.W. 4), the Civil Assistant Surgeon at Tiruppattur, who held the autopsies.

The accused has throughout made a clean breast of her guilt, and a judicial confession was also recorded from her by the Sub-Magistrate, Karaikudi (P.W. 5). In her statement in the committal Court (Exhibit P-13), the accused stated that she tried to end her life, and to drown her three children, on account of poverty and ill-health. In a similar statement made at the trial, the accused added this further reason for her committing the offences, namely, that she was ill-treated by her husband (P.W. 1). It is difficult, on the record, to say how far this allegation has any substance in truth.

Upon abundantly proved facts, which have been admitted throughout by the accused, the lower Court, rightly convicted the accused of murder upon three counts, in respect of the three children whose deaths she caused (section 302, Indian Penal Code), and also of an attempt to commit suicide (section 309, Indian Penal Code). We accordingly

confirm the convictions imposed by the trial Court. There can be no doubt whatever that the accused committed these crimes owing to poverty and ill-health. Her ill-health appears to have been mental as well as physical, and the evidence shows that she suffered from periodical fits of depression. But there is nothing to show that, at the time of committing these offences, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of her acts, or that those acts were wrong or contrary to law. But taking into account the background of circumstances against which these offences occurred, and, in particular, her poverty and ill-health, we do feel that this is a very appropriate case for recommendation to the Government under section 401, Criminal Procedure Code, to remit the portions of the sentences imposed, and to make such further directions in accordance with the law as may be proper in the case. Accordingly, we confirm the sentences also, but recommend to the Government under section 401, Criminal Procedure Code, read with G.O. Ms. No. 222 Ms., dated 20th January, 1931, which has specific applicability to women convicted of infanticide under such circumstances, that the period of imprisonment totally imposed in this case be reduced to rigorous imprisonment for three years, as recommended by the learned Sessions Judge, and further that for this period the accused should be detained in the Madras Seva Sadhan in accordance with the provisions of the G.O. quoted above.

P.R.N. ——— *Appeal dismissed, convictions and sentences confirmed, case recommended to Government under section 401, Criminal Procedure Code.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

S. Joseph .. *Respondent.*

Criminal Procedure Code (V of 1898), section 417 (3)—Appeal against acquittal—Interference by High Court—When proper.

In an appeal against acquittal the High Court will interfere only for substantial and compelling reasons. The High Court will not interfere unless it is convinced that the interest of justice requires that the acquittal must be set aside.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (accused) by the Sessions Judge of Tiruchirapalli in C.A. No. 177 of 1957, on his file S.C. No. 80 and 81 of 1957 on the file of the Assistant Sessions Judge, Tiruchirapalli.

The Public Prosecutor (*P. S. Kailasam*), for Appellant.

V. T. Rangaswami Iyengar, for Respondent.

The Court delivered the following

JUDGMENT.—The accused S. Joseph was convicted under section 471 read with section 466, Indian Penal Code, by the learned Assistant Sessions Judge of Tiruchirapalli Division in Sessions Case Nos. 80 and 81 of 1957, and sentenced to R. I. for two years. On appeal the learned Sessions Judge of Tiruchirapalli in C.A. No. 177 of 1957 has acquitted the accused. Hence this appeal by the State.

The facts are :—Sometime in June, 1956, the Government imposed control over the distribution of cement, obviously, as the production was insufficient to cope with the demand. The Cement Stockists could supply and sell without permit only 15 per cent. of the stock supplied to them by the manufacturers. They should supply or sell the remaining 85 per cent. of the stock only as against permits issued by the competent authority. The Government authorised the District Collector, and, or the Personal Assistant to issue permits for sale of cement between 1 to 5 tons and the Tahsildar of the Taluk concerned to issue permits for sale up to one ton.

* Crl. A. No. 215 of 1958. 12th November, 1958. (21st Kartika, 1880—Saka).

So far as Tiruchirapalli District Collector's Office is concerned, the procedure adopted in the issue of permits was as follows: The District Collector or his Personal Assistant had authority to issue permits for the supply of more than one ton. The Tahsildar of the Taluk concerned was authorised to issue permits for the supply of cement up to one ton. On the receipt of an application for issue of permit for supply of cement the same will be sent to the Huzur Head Clerk No. IV (H.H. C. IV) in the Tiruchirapalli Collector's Office, either by the District Collector or by his Personal Assistant. The said officer would hand it over to the clerk concerned who will put up a note thereon. The application with the office note will then be placed before the District Collector or his Personal Assistant. On their passing orders for supply of a particular quantity, the clerk concerned will prepare an office copy of the permit styling it as a proceeding of the District Collector. The office copy will be submitted to the District Collector or his Personal Assistant as the case may be through the Huzur Head Clerk. The officer concerned will approve of it and sign it. Then the Head Clerk will send it for being fair copied. This will be done with two carbon duplicates. The Head Clerk will sign all of them, send one to the Tahsildar of the Taluk concerned, another to the dealer or stockist, who is directed to supply, and the third to the applicant. The clerk concerned maintains a personal register wherein applications for grant of cement permit, the nature and date of disposal thereof, together with the reference current number and after disposal the L.Dis. number would all be entered. Generally, the received date seal or any other seal of the Collector's Office would not be affixed to the cement permit: *vide* the evidence of P.Ws. 1 to 3. The procedure is not challenged by the accused.

Accused is the proprietor of Fathima Electrical Company, Palakarai. He also carried on business as electrical contractor under Central Public Works Department in Tiruchirapalli Aerodrome and carried out some electrical works in the said Aerodrome: *vide* the evidence of P.W. 7, the Section Officer of Central P.W.D.

P.Ws. 8 and 9 testified that on 27th April, 1957, the accused produced Exhibit P-1 as the cement permit issued by the District Collector's Office authorising him to purchase five tons of cement, that accused paid the price therefor, that Exhibit P-37, is the carbon copy of the cash bill prepared for the sale of the cement, that accused signed therein and that the accused took delivery of the five tons and also the original of Exhibit P-37. P.W. 10 testified that on 8th May, 1957, the accused presented Exhibit P-2 purporting to be a cement permit, signed the endorsement Exhibit P-2 a overleaf thereof in his presence, paid the price therefor and took delivery of five tons of cement and also received from P.W. 10 the original of Exhibit P-40, Exhibit P-40 being the carbon copy of the cash bill prepared for the sale of the cement.

The accused denied the above evidence of P.Ws. 8, 9 and 10. He denied also that he presented Exhibit P-1 to P.W. 8 and Exhibit P-2 to P.W. 10 or signed Exhibits P-37 and P-40 and took delivery of any cement. He examined D.W. 1 to show that the cement was sold by the stockists indiscriminately without knowing anything about the identity of the permit-holders.

The learned Assistant Sessions Judge relying on the evidence of P.Ws. 8 to 10 and also by comparing the admitted signatures of the accused with the disputed signatures in Exhibits P-1 and P-2, held that the accused was guilty of the offence for which he stood charged and convicted and sentenced him as mentioned above.

The law relating to appeals against acquittals has become well-settled. In an appeal against acquittal it has been laid down repeatedly by their Lordships of the Privy Council as well as the Supreme Court that this Court will not lightly interfere with an acquittal. They will pay due regard to the fact that the respondent comes to this Court with the original presumption of innocence fortified by the acquittal by the lower Court. This Court will also bear in mind that the lower Court had the advantage of seeing the witnesses in the box and was able to come to its conclusion on imponderable factors like the "feel" of the case, and which cannot all be translated into paper as well as on the records of evidence. In fact interference with an acquittal is an innovation in the Criminal Procedure Code and this Court will natu-

rally exercise carefully that power to interfere with such acquittals and set it aside. This is sometimes expressed in another fashion, namely, that this Court will interfere for substantial and compelling reasons. In other words, this Court will not interfere lightly and on unsubstantial grounds and what is more it will not interfere unless it is convinced that the interest of justice require that the acquittal must be set aside. These are the principles laid down by the Privy Council and the Supreme Court, whatever the phrases which might be used, and which are not terms of art. The sum and substance of all that has been laid down by both the Privy Council and the Supreme Court is that you must have good and sufficient and cogent grounds to interfere and you must interfere only when the interests of justice manifestly require it. Thus, in essence there is no distinction between an appeal against an acquittal and an appeal from a conviction on principle. But the difference is only on the accent.

That this is really the settled law will be evident from the following tabular statement of the judgments of the Supreme Court :

Sheoswarup v. *King Emperor*, 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 : A.I.R. 1934 P.C. 227 (P.C.).	High Court has full power to review evidence. No limitation should be placed upon the power unless it is expressly stated in the Code. No distinction between appeal against acquittal and appeal from a conviction.
Noor Mahamed v. *Emperor*, (1945) 2 M.L.J. 362 : A.I.R. 1945 P.C. 151 (P.C.).	
Prandas v. *State*, A.I.R. 1954 S.C. 36 ..	*Six Judges.* (Kania, C.J., Fazl Ali, Mukherjea, Patanjali, Mahajan, and S. R. Das, JJ. Fazl Ali, J.,). Judgment. *Sheo Swarup's case* approved para. 6 judgment.
Tulsiram Karu v. *State*, (1953) S.C.J. 612 : A.I.R. 1954 S.C. 1 (S.C.).	Kania, Patanjali & S. R. Das, JJ. An experienced Judicial Officer (S.J.) having had reasonable doubt the High Court requires good and sufficiently cogent reasons to overcome such reasonable doubt.
Walayat Khan v. *State of U.P.*, I.L.R. (1953) 1 All. 189: A.I.R. 1953 S.C. 122.	Fazl Ali, Mahajan and Chandrasekhara Iyer, JJ. The power of the High Court in appeal aganist acquittal are as wide as in appeals from conviction. But there are two points to be borne in mind : 1. Presumption of innocence continues. 2. Slow to disturb the finding of the Judge who saw and heard the witnesses.
Surajpal Singh v. *State*, (1952) S.C.J. 32 : (1952) 1 M.L.J. 426: 1952 S.C.R. 193 : A.I.R. 1952 S.C. 52 (S.C.).	Fazl Ali and Bose, JJ. High Court has full power to review the evidence but it is equally well-settled that the presumption of innocence is further reinforced by the acquittal by the trial Court which had the advantage of seeing the witnesses and hearing their evidence could be reversed only for very substantial and compelling reasons. The High Court had not discussed the evidence of 4 witnesses. Had not met the objection pointed out by the Sessions Judge.
C. M. Narayana v. *State of Travancore*, A.I.R. 1953 S.C. 478.	Patanjali C.J., Mukerjee, S.R. Das, Bose, Ghulam Hasan, JJ. Follows *Sheo Swarup's case.*
Puran v. *State of Punjab*, (1954) 2 M.L.J. 124: (1954) S.C.J. 573 : (1955) 1 S.C.R. 243 : A.I.R. 1953 S.C. 459 (S.C.).	Mahajan, S.R. Das, and Bhagavati, JJ. Findings can be revesed only for substantial and compelling reasons. Refers to *Sheo Swarup's case,* but finally concludes by saying that they were not able to see any *compelling or substantial reasons* for reversing the order of acquittal.
Zwinglee Ariel v. *State of Madhya Pradesh*, A.I.R. 1954 S.C. 15.	Mahajan, S.R. Das and Bhagavati, JJ. Quotes *Sheo Swarup's case* with approval.
Ajmer Singh v. *State of Punjab*, (1953) S.C.J. 85 : (1953) S.C.R. 418 : (1953) 1 M.L.J. (S.C.) 37 : A.I.R. 1953 S.C. 76.	Mahajan, S.R. Das and Bhagavati, JJ. Can only be reversed for *substantial and compelling* reasons.

Trimbak v. *State of M.P.*, A.I.R. 1954 S.C. 39.	Mahajan and Bhagavati, JJ. There is a heavy onus on the prosecution to prove that the order is *manifestly erroneous*. The High Court seems to have approached the case as if it was considering an appeal against conviction.
Rao Shiva Bahadur Singh v. *State of Vindhya Pradesh*, (1954) S.C.J. 362 : 1954 S.C.R. 1098 : A.I.R. 1954 S.C. 322 (S.C.).	Bhagavati, Jagannadha Das, Venkatarama Ayyar, JJ. Follows *C. M. Narayan* v. *State of Travancore*, A.I.R. 1953 S.C. 478 which follows *Sheo Swarup's case.*
Madan Mohan Singh v. *State of U.P.*, A.I.R. 1954 S.C. 637.	Mukerji, Bose and Ghulam Husan, JJ., Follows *Sheo Swarup's case & Narayan* v. *State of Travancore*.
Bansidhar Mohanty v. *State of Orissa*, A.I.R. 1955 S.C. 585.	Mahajan, C.J., S. R. Das, Bhagwati and Venkatarama Ayyar, JJ.. Follows *Sheo Swarup* v. *King Emperor*, 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 : A.I.R. 1934 P.C. 227 (P.C.). *Surajpal Singh* v. *State*, (1952) 1 M.L.J. 426 : (1952) S.C.J. 32 : 1952 S.C.R. 193 : A.I.R. 1952 S.C. 52 (S.C.). *Puran* v. *State*, (1954) 2 M.L.J. 124 : (1954) S.C.J. 573 : (1955) 1 S.C.R. 243 : A.I.R. 1953 S.C. 459 (S.C.). *Narayan* v. *State of Trav.*, A.I.R. 1953 S.C. 478. Wording of Sheo Swarup reiterated. High Court is not justified in an appeal against acquittal in brushing aside the view taken by the trial Court which is by no means patently absurd or unreasonable because as a result of laborious process of reasoning, it is possible to take a different view on the evidence.
Atley v. *State of U.P.*, A.I.R. 1955 S.C. 807.	Bose, Venktarama Ayyar and Sinha, JJ. High Court can review the evidence. Refers to *Surajpal Singh* v. *State*, (1952) S.C.J. 32 : (1952) S.C.R, 193 : A.I.R. 1952 S.C. 52, *Wilagakhan* v. *State*, I.L.R. (1953) 1 All. 189 : A.I.R. 1953 S.C. 122 (S.C.).
Surjan v. *State of Rajasthan*, A.I.R. 1956 S.C. 425.	Bose and Jaganadha Das, JJ. High Court is free to appreciate the evidence and will be slow to reverse an acquittal except for *strong and compelling* reasons.
Aher Raja Khina v. *State of Sourastra*, (1956) 1 M.L.J. (S.C.) 135 : (1956) S.C.J. 243 : (1955) 2 S.C.R. 1285: A.I.R. 1956 S.C. 217 (S.C.).	Bose, Venkatarama Ayyar and Chandrasekhara Iyer, JJ., Venkatarama Ayyar, J., dissenting. Per Majority.—It is not enough for the High Court to take a different view but there must also be substantial and compelling reasons. If the trial Court takes a reasonable view interference is not justifiable unless there are really strong reasons for reversing. *Ajmer Singh* v. *State of Punjab*, (1953) 1 M.L.J. 376 : (1953) S.C.J. 85 : (1953) S.C.R. 418 : A.I.R. 1953 S.C. 76., *Surajpal Singh* v. *State*, (1952) 1 M.L.J. 426 : (1952) S.C.J. 32 : 1952 S.C.R. 193 : A.I.R. 1952 S.C. 52 (S.C.).
Balbir Singh v. *State of Punjab*, A.I.R. 1957 S.C. 216.	Bhagawati, Imam, S.R. Das, Govinda Menon, JJ. Refers to *Prandas* v. *State*, A.I.R. 1954 S.C. 36, *Sheo Swarup* v. *King Emperor*, 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56. All. 645 (P.C.) : A.I.R. 1934 P.C. 227 (P.C.) *Surajpal* v. *State*, *Ajmeer Singh* v. *State*, *Aher Raja Khima* v. *State of Sourashtra*. There must be sufficient and compelling reasons.
Bhagwan Das v. *State of Rajasthan*, (1957) 1 M.L.J. (Cr.) 478 : (1957) S.C.J. 515 : A.I.R. 1957 S.C. 589 (S.C.).	Bhagawati and Kapur, JJ. High Court should not set aside an order of acquittal unless there are substantial and compelling reasons for doing so. Following *Surajpal Singh's case.*
Ramjanam Singh v. *Bihar State*, A.I.R. 1956 S.C. 643.	Acquittal strengthens the hands of the accused. Strong presumption of evidence is not displaced.

Bearing these principles in mind, let us examine the facts of this case. On a review of the entire circumstances, I have come to the conclusion that the learned Sessions Judge has given good, sufficient and cogent reasons for holding that the prosecution had not established the case beyond reasonable doubt against the accused. Here are my reasons.

The case for the accused that on account of certain disorderliness prevailing in the administration for issue of permits for distribution of cement, many people have taken advantage in collusion with the revenue staff of the District Collector to bring about forged permits and deliveries of the same to the stockists, stands fully made out. The evidence of P.Ws. 1 to 6 shows that sufficient precautions were not taken and sufficient check was not made either in the Collector's Office or in the Taluk Office to ensure prevention of use of forged permits for purchasing cement. P.W. 5, the Tahsildar testified that about the last week of April 1957, P.W. 4 the Revenue Divisional Officer orally told him that there were complaints to the effect that clerks and peons of the Taluk Office were issuing forged permits. P.W. 4 issued a printed order as per Exhibit P-34 dated 22nd May, 1957, to the village Headmen that they should recommend only persons who had real necessity for cement. Therefore, the version of the accused that taking advantage of this disorderliness, the two forged permits forming the subject-matter of the prosecution, might have been secured and utilised by some persons taking also advantage of the fact that this accused was a contractor of the Aerodrome and that if permits were issued in his name, stockists would readily sell the cement on those permits is not unfounded.

Then, that the stockists were also either by design or by accident careless in issuing cement against forged permits is evident from the fact that notwithstanding the rules, no copy of the permit is said to have been issued to the accused was received by the stockists, they still issued cement and did not also ask or remind the Collector's Office for copies being sent to them even assuming that with a view to oblige contractors they supplied the cement before receiving the copies of permits.

It is difficult to believe the stockists P.Ws. 8 and 10 when they swore that either the accused and a Mohammadan known to them as the servant of the accused came and produced the permits and it was only when the accused signed the permits the cement was supplied. First of all, the signatures have not been brought home to the accused. The learned Assistant Sessions Judge who purported to have compared the disputed signature with certain admitted signatures of the accused, pronounced in favour of the genuineness. The learned Sessions Judge did the contrary. No handwriting Expert of the Government has been examined. In this very case the accused has examined a witness D.W. 1, the village Headman of Somarasampettai who testified about Exhibit D-5. P.W. 8 says that this Exhibit D-5 was a permit issued to one Sankaralingam whom he knew to be a resident of Somarasampettai and a real person. But the village Headman of Somarasampettai states that there is no such person at all in that village. The servant of the accused who is said to have brought one of the permits is said to be a Muslim by name Abdul Gaffoor or Ajiba. But neither of them has been traced. The accused denies that he had a Muslim servant whose name was Abdul Gaffoor or Ajiba. P.W. 11 the Investigating Officer could not get at Abdul Gaffoor or Ajiba. In fact the learned Sessions Judge has rightly characterised the story of the stockists that they knew the Muslim servants of the accused and that they spotted them when the transaction was effected, when there were a large number of transactions in the shop and they could not reasonably be expected to remember the persons who came to the shop, as not acceptable.

Therefore, the learned Sessions Judge could not be said to have had no good or sufficient ground when he held that the presentation of permits and taking delivery of the cement by the accused or his servants has not been brought home to him. Then when 80 tons are said to have been issued to this accused in the course of one month, and in regard to which the charges relate only to ten tons, and when the accused's business place is situated opposite to the Palakarai Police Station and it is the common case that the accused was not executing any works during that period, these 1000 and odd bags could not have vanished into thin air. Still we have not a tittle of

evidence in regard to the financing or the disposal of this large quantity of cement. When it is to the self-interest of the stockists to assert the same as otherwise if they are shown to have supplied cement to fictitious persons their licence would be cancelled, the learned Sessions Judge has rightly stated that under these circumstances in the absence of other corroborating materials enabling us to accept the testimony of P.Ws. 8 to 10, it is unsafe to rely on the testimony of P.Ws. 8 to 10 alone to hold that the accused personally appeared at the shops of P.Ws. 8 to 10 presented Exhibits P-1 and P-2, signed on them and purchased the cement.

Therefore, there are no grounds to interfere with the acquittal by the learned Sessions Judge. This appeal is dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT : MR. JUSTICE SOMASUNDARAM.

S. Krishnamurthy .. *Appellant**

Penal Code (XLV of 1860), *section* 161—*Receipt of illegal gratification—Frame of charge—Need to conform to the requirements of section.*

In a prosecution for an offence under section 161 of the Penal Code it is necessary to prove all the ingredients of the offence as set out in the section. Mere receipt of money by a public servant in order to get a job for another person somewhere would not by itself necessarily be an offence under section 161 of Indian Penal Code. The rendering or attempting to render any service with any public servant, should be referred to in the charge and established before an accused could be convicted of an offence under that section.

Appeal against the Judgment of the Special Judge, Madras in Case No. 5 of the Calendar for 1958.

A. S. Sivakaminathan and *T. R. Gnanasekaran*, for Appellant.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court delivered the following

JUDGMENT.—The appellant was tried by the Special Judge, Madras for offences under section 161, Indian Penal Code and section 5 (i) (*d*) read with section 5 (*a*) of Act II of 1947 and convicted. He was sentenced to imprisonment till the rising of the Court and a fine of Rs. 300/-

The prosecution case may be briefly stated as follows :

The appellant was a Clerk employed in the Records Section of the Chief Engineer's Office, Southern Railway. P.W. 2, Kulasekharan, a young man of about 22 years is said to have been trying for a job. Having heard that there was recruitment for the the post of Khalasi in the General Mechanical Department of the Southern Railway, he is said to have gone to that office for the purpose of getting the necessary information and applying for the post. P.W. 2 is a stranger to the accused. But when he went to the office he is said to have been seen by the accused in the office. The accused came out immediately on seeing P.W. 2 and asked him what he wanted. P.W. 2 told him that he was in need of a job and immediately the accused told him to come to his house that evening and gave him his address. But P.W. 2 did not meet the accused that evening in his house as he says that he sustained an injury while playing football. Three days later, on the 27th he went to the house of the accused. Then the accused is said to have given him a draft application asking him to make out such an application in his own handwriting. The accused also asked P.W. 2 to bring his S. S. L. C. Book. More than all these he demanded from P.W. 2 Rs. 50 to try for the job. P.W. 2 is stated to have pleaded poverty and finally the bargain was struck at Rs. 30.

P.W. 2 is said to have taken Rs. 30 from his father the next day. He is also said to have written a fair application Exhibit P-4. But suddenly he realised that it was wrong and virtuous sentiments overtook him all of a sudden and he decided that he should not pay a bribe and get a job. He immediately went to the Special Police

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* Crl. A. No. 110 of 1959. 26th August, 1959.
4th Bhadra 1881—Saka.

Establishment after hearing that there was a such a department constituted by the Government, to detect offences of this type, and gave information to them. The Officer who was naturally on the look out for such culprits, took a witten complaint and asked him whether he brought the money and when P.W. 2 showed him the thirty rupees, the officer noted down the number of the currency notes in a paper and got P.Ws. 3 and 4 to attest the same. Then he is said to have given the *modus operandi*, as to how P.W. 2 should pay the money and where they would wait. The next day, in accordance with the directions given by the police, P.W. 2 went to the house of the accused for the purpose of paying the money but the accused was not in his house. The Police Officers asked P.W. 2 to wait till the accused returned home. The accused returned home at 9 P.M. After a little while he came out wearing only a banian and made enquiries of P.W. 2. P.W. 2 gave the application form and Rs. 30 to the accused. All this happened while they were walking together leaving the house. After getting the money the accused is said to have promised to get P.W. 2 the job. In the meantime P.W. 2 informed the Police Officer of the payment of the money to the accused. The Police officers went past the accused and stopped him. On being questioned, the accused at first denied but subsequently took out the application form and Rs. 30, from inside his banian. The witnesses whom the officer took, attested the mahazar. After further investigation the accused was charge-sheeted for the offences mentioned above. There can be no doubt that this Rs. 30 was recovered from the accused under the circumstances mentioned by prosecution witnesses, that is, P.W. 2 paid Rs. 30 at the place mentioned and they were found inside the accused's banian along with the application. But the rest of the story is all a put up one, that is to say, it is not as if on seeing P.W. 2 the accused came out immediately and that P.W. 2 suddenly became virtuous in his sentiments and wanted to prove to be the right type of citizen. It must all have been arranged by the Special Police Establishment. That the trap was laid and the police succeeded in the trap cannot be disputed. The result is that the accused undoubtedly was in possession of Rs. 30 given by P.W. 2, which was certainly given for the purpose of getting a job for P.W. 2 as a Khalasi.

The leared counsel Mr. Sivakaminathan appearing for the accused has taken a point of law and that is that in the charge as framed by the Special Judge there is no mention that the money was taken by the accused for the purpose of using his influence with a particular public servant or any public servant. The first charge as framed is as follows :—

"That you being a public servant, employed as a Clerk in the Record section of the Chief Engineer's Office, Southern Railway, Madras, on or about the 28th day of February, 1957, at Madras (near Mambalam) Railway Station did demand and accept a sum of Rs. 30 (thirty only) from Shri N. Kulasekharan as gratification, other than legal remuneration; as a motive for getting him a Khalasi's post in the Railway in pursuance of earlier demands made by you; and thereby committed an offence punishable under section 161, Criminal Procedure Code and within my cognizance."

The relevant portion of section 161 Indian Penal Code runs as follows :

"Whoever, being........a public servant, accepts or obtains......any gratification whatever, other than legal remuneration, as a motive........for doing......favour......to any person, or for rendering......any service......to any person,......with any public servant, as such......"

The contention is that the charge does not contain the words "with any public servant" mentioned in section 161, Indian Penal Code. Normally, I should have thought that when a person accepts money saying that he will get a job for him it carries with it necessarily the implication that he is going to use his influence with the concerned public servant. In my opinion, there is really no need to add the words or mention the words "with any public servant" in the charge. But the learned counsel is supported in his contention by a decision of the Supreme Court in *State of Ajmer* (Now Rajasthan) v. *Shivji Lal*[1]. In that case the charge that was framed was more or less similar to the one framed in this case and there was no reference to "Public servant" therein. His Lordship Wanchoo, J., observed as follows at page 592 :—

"........the first two ingredients set out above are clearly established in this case ; but the third ingredient, (namely, that the gratification should have been taken as a motive or reward for rendering or attempting to render any service with any public servant) is not even charged against

1. (1959) M.L.J. (Crl.) 589.

the accused. The charge merely says that he took the money as a motive for securing a job for Prem Singh in the Railway Running Shed, Abu Road. It does not disclose who was the public servant whom the accused would have approached for rendering or attempting to render service to Prem Singh in securing a job for him. Even in the complaint made by Prem Singh to the Deputy Superintendent of Police all that was said was that the accused told Prem Singh that he would secure a job for him at Abu Road, because he had considerable influence there. It was not disclosed as to who was the public servant on whom the accused had influence and whom he would approach in order to render service to Prem Singh. In his statement also Prem Singh did not say that the accused had told him that he had influence on any particular public servant at Abu Road whom he would influence in order to render this service to Prem Singh, namely, procuring him a job. It is true thatthe application was addressed by Prem Singh to the Divisional Mechanical Engineer and was given to the accused who said that it was all right; but Prem Singh did not even say that the accused has asked him to address the application to the Divisional Mechanical Engineer. It seems that the application was addressed to the Divisional Mechanical Engineer, simply because, he was obviously the officer in charge of the Railway Running Shed at Abu Road. Thus, Prem Singh did not say either in his complaint or in his statement that the accused had told him that he would render service to him by approaching a particular public servant. In the Charge sheet submitted by the Police as well as in the charge framed by the Court, it was not disclosed whether any public servant would be approached to render service to Prem Singh, *i.e.*, by securing him a job. In the circumstances one of the ingredients of the offence under section 161 was neither alleged, nor charged, nor proved against the accused The mere fact that a person takes money in order to get a job for another person somewhere would not by itself necessarily be an offence under section 161, Indian Penal Code unless all the ingredients of that section are made out. As in this case one of the main ingredients of that section has not been made out, the accused would be entitled to acquittal".

These observations of Wanchoo, J., apply with equal force to the facts of this case, because one of the main ingredients of the section, namely, rendering or attempting to render any service with any public servant is not referred to in the charge, is not spoken to by the witnesses and is not mentioned in the complaint. Therefore in this case the accused is entitled to acquittal on the principle laid down by the decision of the Supreme Court referred to above. The convictions and sentences must be set aside and the accused must be acquitted. The convictions and sentences of the accused are set aside and he is acquitted.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMASUNDARAM AND MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

Semalai Pannadi and another .. *Respondents.*

Penal Code (XLV of 1860), sections 300, Exception 2, 430 and 103—Exceeding right of private defence in preventing mischief and causing death—Conviction.

The accused used a heavy instrument like a spade on the head of the deceased so forcibly as to fracture the skull extensively and injure the brain causing his death.

Where the deceased was committing the specific offence of mischief enumerated in sction 430, Indian Penal Code, *i.e.*, by wrongfully diverting water, the accused was justified in preventing him forcibly from consummating that mischief in defence of the property of his master.

The accused was held however to have clearly exceeded the right of private defence and therefore his act falls within the *Exception* 2 to section 300, Indian Penal Code and the conviction under section 304 (Part II) of the Penal Code has to be confirmed.

Elements of mischief under the Penal Code analysed.

Appeal under section 417 Criminal Procedure Code against the acquittal of the Respondents (Accused Nos. 1 and 2) by the Sessions Judge of the Coimbatore Division in Case No. 142 of the Calendar for 1958 of an offence under section 302 read with section 34, Indian Penal Code.

The Public Prosecutor (*P. S. Kailasam*) for Appellant.

S. Mohankumaramangalam, for 1st Respondent.

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* Crl. A. No. 105 of 1959. 27th July, 1959.
(5th Sravana 1881—Saka.)

S. Sethuratnam for 2nd Respodent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is preferred by the State against the acquittal of Semalai Pannadi (Accused 1) for an offence under section 302, Indian Penal Code by the learned Sessions Judge of Coimbatore in Sessions Case No. 142 of 1958. He was convicted under section 304 (Part II) and sentenced to rigorous imprisonment for five years. But he has not preferred an appeal against the said conviction and sentence. The State also appeals against the acquittal of Accused 2.

The case against Accused 1 was: The deceased Kanda Pannadi was a ryot cultivating Naduvakadu on lease from one Murugana Goundan. To the west of this land is the land of Ramana Goundan called Parambukorai. The accused Semalai Pannadi was the Thannirkatti of the deceased Kanda Pannadi till Chitrai last when his services were dispensed with. Thereafter he became the Thannirkatti of Rama Goundan. These lands were irrigated with the water of Puthu Vaikal. This water was diverted to these lands by Koppus. Parambukorai of Ramana Goundan is irrigated through the southern Koppu and the land of the deceased through the middle Koppu. It is the case both for the prosecution as well as the accused that on 15th June, 1958, transplantation was going on in Parambukorai, supervised by the Thannirkatti accused. The deceased when he came to the field in the morning found that there was overflow of water into Parambukorai and there was no water flowing into his land. The water was flowing into Parambukorai, through the legitimate Southern Koppu. The deceased therefore went to the Southern Koppu and blocked it in order to divert the water into the middle Koppu from the Puthu Vaikal. The accused removed the block. In fact the deceased was closing and the accused was removing the block for about ten minutes and there was an exchange of hot and obscene words. The accused had a spade in his hand and he hit the deceased on his head with the wooden portion of the spade. The deceased fell down into the Koppu. P.W. 1 who had accompanied Kanda Pannadi, raised an alarm and tried to interfere and sustained an injury. The accused left the place with his spade westwards. P.W. 3, the Thannirkatti of a neighbouring land, witnessed this. The alarm raised by P.W. 1 brought to the scene P.W. 2 and some women including P.W. 7 who were working in the vicinity. P.W. 1 and others lifted the deceased and laid him on the ridge and administered some cold-rice-water to him. On P.W. 1's information Palani Pannadi (P.W. 8) the elder brother of the deceased, came there. The deceased was taken in a cart to Gobichettipalayam Police Station. There he gave a report to the Head Constable P.W. 6 implicating this accused as his assailant. He was sent to the Hospital. The Doctor P.W. 5 got his dying declaration recorded by the Sub-Magistrate P.W. 4. In that statement Kanda Pannadi implicated this accused as his assailant. Kanda Pannadi died in the hospital on 21st June, 1958 at 4 A.M.

The case for the accused was that Kanda Pannadi blocked the flow of water at the Pali and we exchanged words for some time. He closed the Pali and I opened it There is a place there about chest high. He pushed me and I pushed him. He was standing on the raised portion and I was standing on the lower portion. I pulled his hand after he pulled me. Then he fell down on the cement construction and sustained an injury on the head. He got up and went. I went southwards to my land to attend to my work. Kanda Pannadi went away walking."

The learned Sessions Judge came to the conclusion that the prosecution has affirmatively and satisfactorily proved that the deceased Kanda Pannadi was hit with a spade by this accused which brought about the fracture of the whole of the right temporal bone and the right and left parietal bones, resulting in injury to the brain necessarily bringing about fatal result. But in the circumstances of the case he held that the offence would fall under section 304 (Part II) Indian Penal Code and sentenced the accused to rigorous imprisonment for five years. Hence this appeal by the State in regard to the acquittal under the more serious charge which

they are entitled to prefer. *Kishan Singh* v. *The King Emperor*[1], *Sita Ram* v. *Emperor*[2], *Zalmir Qasim* v. *Emperor*[3], *Emperor* v. *Sheo Darshan Singh*[4], *Subba Chukli, in re*[5], *Emperor* v. *Shivaputraya*[6].

The first point for determination is whether the offence has been affirmatively and satisfactorily brought home to the accused before determining what the offence would amount to. It will be remembered that the accused has not appealed against his conviction and sentence under section 304 (Part II). But as pointed out by Horwill, J., in *Public Prosecutor* v. *Panchaksharam*[7], followed in *Venkataramiah* v. *Vanajakshamma*[8].

"In an appeal against acquittal the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. If therefore the counsel for the accused is entitled to argue on the facts of the case to show that the accused has not committed an offence under section 304, Indian Penal Code, then although the acceptance of those arguments may not automatically set aside the conviction under section 335, Indian Penal Code, yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise *suo motu* its powers under section 439 (1), Criminal Procedure Code and set aside the conviction".

Bearing these principles in mind, and examining the facts of this case, we hold that the prosecution has affirmatively and satisfactorily proved that it was the accused who inflicted injuries on the deceased with a spade which resulted in his death. The motive for the commission of the offence was the attempt of the deceased to divert water flowing through the Southern Koppu to Parambukorai into the middle Koppu in order to take water to Nadavukadu. P.W. 1 who intervened and sustained an injury speaks to the occurrence and he is corroborated by P.Ws. 2, 3 and 7 who witnessed the occurrence as they came there, when they were working in the vicinity at that time, on hearing this galatta. P.W. 8 has come and learnt of what had happened and taken the deceased to the Gobichettipalayam Police Station. In the first information report given by the injured man himself, he has implicated this accused as his assailant. In the dying declaration recorded from him subsequently, he has implicated this accused as his assailant. The medical testimony shows that the injured man could have received the injuries at the time and in the manner mentioned by the prosecution. In the face of this overwhelming testimony, the uncorroborated and untested statement of the accused from the dock cannot be accepted. In fact it is even medically impossible that the deceased could have sustained the injury in the manner stated by the accused. Therefore, the prosecution has affirmatively and satisfactorily brought home the offence to the accused that he inflicted the injuries on the deceased with a spade terminating fatally.

The next point for consideration is what would the offence amount to? There can be no doubt that the conviction under section 304 (Part II) Indian Penal Code cannot be sustained on the reasoning of the learned Sessions Judge. It is enough to reproduce the following sentences from his judgment.

"There is nothing in the evidence to justify the conclusion that even though Accused-1 had carried a spade with him he had any intention to kill Kanda Pannadi. If he had any such intention, he could have atatacked Kanda Pannadi even as he blocked the Koppu. The fact that he used only the back side of the spade clearly would further exclude the theory of any intention on his part to kill Kanda Pannadi. All the same, when Accused 1 beat Kanda Pannadi on his head with the back portion of the spade, he should have known that he was doing a dangerous act likely to cause death."

If the matter had really stood thus, we would have had no hesitation in interfering with the conviction under section 304 (Part II), Indian Penal Code and altering into one under section 302, Indian Penal Code because a person using a heavy instrument like a spade so forcibly on the head of the deceased as to fracture the skull extensively and injure the brain, will be plainly guilty of the offence of murder.

But on the facts of this case we find that the act committed by the accused would fall under section 304 (Part II), Indian Penal Code by reason of Exception 2 to section 300, Indian Penal Code.

1. (1928) 55 M.L.J. 786 : L.R. 55 I.A. 390 : I.L.R. 50 All. 722 (P.C.).
2. A.I.R. 1925 Oudh 723.
3. A.I.R. 1944 All. 137 (F.B.).
4. (1922) I.L.R. 44 All. 332.
5. (1925) 52 M.L.J. 707 : I.L.R. 50 Mad. 259.
6. (1924) I.L.R. 48 Bom. 510.
7. (1938) M.W.N. (Crl.) 125.
8. A.I.R. 1956 Nag. 8.

"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of......property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purposes of such defence."

This has to be read with section 103, Indian Penal Code which lays down :

"The right of private defence of property extends under the restrictions mentioned in section 99, to the voluntary causing of death, or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated namely :—

* * * * * * *

Fourthly—Mischief........under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised."

Therefore, we have to find out whether the deceased was committing mischief and this requires the exposition of the offence of mischief made punishable under the Indian Penal Code from section 425 onwards. The term mischief is derived from (M. E. meschef bad result O *mischief* to be unfortunate *mes* (L *minus* less) + Chief end, head F chef, chief) Webster's New International Dictionary Page 1379; Ballentine Law Dictionary (U.S.A.) (The wilful and unlawful injury to or destruction of the property of another with malicious intent to injure the owner). 34 American Jurisprudence 688 ; Funk and Wagnall's New Standard Dictionary and English language (V.I.T. to harm or destroy) ; Shorter Oxford (To inflict loss or injury upon).

Section 425 defines the offence of mischief and section 426 provides the punishment for this offence. Mischief, like most crimes, comprises a mental, and a physical element. The mental element is the intention, express or implied (from knowledge of likelihood of injury) to cause wrongful loss or damage. The physical element is an act of destruction or injurious change to property (see sections 427 to 440). Whilst the mental element is the same in all kinds of mischief, the physical element, the act of destruction or change, may be of any kind of that species of acts, and if the act is of the kind specified in sections 427 to 440, the mischief is aggravated and therefore more severaly punished thean under section 426.

There are fourteen aggravated offences of mischief which may be thus classified:

(i) By reason of the amount of damage caused (S. 427).

(ii) Mischief in regard to animals (Ss. 428, 429).

(iii) Mischief in regard to water supply and public works (Ss. 430 to 434).

(iv) Mischief by fire (Ss. 435, 436).

(v) Mischief in regard to decked vessels (Ss. 437, 438).

(vi) Mischief in regard to any vessel, with intent to steal (S. 439).

(vii) Mischief with preparation for causing death or hurt, or wrongful restraint, or fear of such (S. 440).

There must be an intent, express or implied (from knowledge) in law to cause (i) wrongful loss, or (ii) damage. This is the mental element (*mens rea*) in the offence. The first is a dishonest intention (section 24) and this does not exist where the loss is caused under a *bona fide* claim of right to do the act in question, as where a man reaps the crops grown on his land by another who had no right to plant them there, or where he diverts the flow of water in a water-course, to which the complainant has no right. The mere assertion of a right unsupported by facts is no defence, *Ramakrishna* v. *Palaniandi*[1], especially when it has previously been raised, and has failed in legal proceedings ; *Chakoo* v. *R.*[2], and even a valid claim of right or one honestly believed in will not cover loss or damage in excess of that which could have been reasonably supposed to be necessary for the assertion or protection of the right. *R.* v. *Clemens*[3]. *Miles* v. *Hutchings*[4] ; *Heaven* v. *Crutchley*[5]. The dishonest intention is usually

1. (1876) I.L.R. 1 Mad. 262 : 1 Weir 502 (F.B.).
2. (1906) 5 Crl. L.J. 278 : 11 C.W.N. 467.
3. L.R. (1898) 1 Q.B. 556.
4. L.R. (1903) 2 K.B. 714.
5. (1904) 68 J.P. 53.

apparent on the face of the act, but if it is not so apparent it must be proved, *R.* v. *Bai Baya*[1]. In construing whether a thing is done with a dishonest intention or not, the primary and not the mere remote intention should be looked at, *R.* v. *Harlan*[2]. The immediate and more probable intent and not the remoter and less probable, should be attributed, *Queen Empress* v. *Gridhari Lall*[3].

It is no answer to a charge of mischief to plead that the motive of the accused was to benefit himself, and not to injure another, if he knew that he could only secure that benefit by causing wrongful loss to another; *R.* v. *Budh Singh*[4]. For examples of an intended wrongful loss, see *Illustrations* (*a*), (*b*), (*c*) and (*g*) to section 425, Indian Penal Code.

The intention of the accused need not, however, necessarily be dishonest, *i.e.*, he may not intend to cause wrongful loss of another's property; he may intend to damage it. Damage is not the same thing as loss. By loss is meant loss of possession; by damage is meant an injury other than loss of possession. To steal a sheep is to cause wrongful loss; to subsequently kill it is mischief. Wrongful loss is not an essential ingredient in the offence of mischief. As in the case of a claim of right, so in this case, a *bona fide* belief that the thing injured by him was own property, to treat as he liked would prevent his conduct from amounting to mischief. For examples of intended damage, see *illustrations* (*d*), (*e*), (*f*) and (*h*) of section 425, Indian Penal Code.

An effect is likely to take place when or where there is a likelihood of its being caused and likelihood is distinguishable from mere possibility; A thing is possible when it may happen; likely when the chances are in favour of its happening and probable when the chances are strongly in its favour. Thus probability is the one stronger degree of likelihood. A thing may therefore be likely without being probable though a thing probable must be likely.

The physical element in mischief is an act causing destruction of or change in some property as the immediate result thereof, *i.e*, a direct result. The act itself must in fact constitute the injury; *Proceedings 12th November*, 1874[5]; *Proceedings 19th August*, 1868[6] and not be too remote thereto. The *Illustrations* to section 425, Indian Penal Code, show that it is not intended to cover cases of negligence, *Shah Jeychand* v. *Thaker*[7]. It will be observed that in each of the *Illustrations* to the section 425, Indian Penal Code, the loss or injury is the immediate result of the act in question.

The nature of the injury may be (1) destruction, or (2) an injurious change, *i.e.*, one which destroys or diminished its value or utility, or affects it injuriously. The injury is thus something physical, and due to a physical cause; not for instance "pollution" of articles of food in the eyes of caste Hindus, *R.* v. *Moti Lal*[8].

The sufferer may be the owner of the property in question or a joint owner with the person who commits the mischief, or a person having only some legal interest in the thing destroyed or injured, the offender himself being the owner. (See *Explanations* 1 *and* 2 and *Illsutrations* (*a*), (*b*), (*c*), (*h*) of section 425) and *Illustrations* (*d*), (*e*) (*f*).

Change is a physical change in composition or form, *e.g.*, the drying up of a river-bed, a consequent destruction of the fish in the river, arising from a diversion of water from the river, *R.* v. *Chanda*[9]. A change in value is not sufficient to constitute mischief, *e.g.*, to cause a company's shares to fall in value by means of spreading false reports against the company.

The thing injured must belong to some one. Its value is immaterial, (*R.* v. *Vyapuri*[10]). A thing abandoned is not property and is not therefore the subject of mischief, *e.g.*, a dedicated bull at large. But graves in charge of a guardian are

1. I.L.R. 7 Bom. 126.
2. (1892) I.L.R. 19 Cal. 380.
3. (1886) I.L.R. 8 All. 653 at 661.
4. (1879) I.L.R. 2 All. 101.
5. (1874) 7 Mad.H.C.R. (App. Side) 39.
6. (1868) 4 M.H.C.R. (Crl. Appellate Side) 15; Weir 512.
7. (1904) 1 Crl. L.J. 488.
8. (1901) I.L.R. 24 All. 155.
9. (1905) I.L.R. 28 All. 204.
10. (1882) I.L.R. 5 Mad. 401; Weir 490.

property, and to plough up such graves for the purpose of cultivation constitutes mischief.

Property is affected injuriously, if injury is caused to it, *viz.*, when any harm whatever is illegally caused to it, *i.e*, caused by conduct which is in itself an offence or which is prohibited by law, or which furnishes ground for a civil action.

These principles are embodied in the following decisions: *Sri Ram* v. *Emperor*[1]; *Karim Bux* v. *The State*[2]; *Amarendra* v. *The King*[3]; *Vyyapuri* v *Kuppuswami*[4]; *Akbarullah* v. *Farumjullah*[5]; *Bhagvan Ramna* v. *The State*[6]; *Appayya*, In re[7]; *Sippattar Singh* v. *Krishna*[8]; *Bata Krishna Gose* v. *The State*[9]; *Sailem Sardar* v. *The State*[10]; *Arjun Singh* v. *The State*[11].

Bearing these principles in mind, if we examine the facts of this case, there cannot be the slightest doubt that the deceased was committing the spcific offence of mischief enumerated in section 430, Indian Penal Code, *Ramakrishna Chetty* v. *Palaniandi*[12]; *Narasimha Rao* v. *Ayyanna*[13]; *Deenabandu* v. *Visvasarayi*[14]; *Kovvada Sanyasi Naidu*, In re[15]; *Authinarayanaswami* v. *Subbier*[16]; *Kullappa Naicker* v. *Palani*[17]; *Budda Reddi*, In re[18]; *Krishna Iyer* v. *Ayyappa*[19]; *Chengama* v. *Emperor*[20]; *Athimolam* v. *Palaniandi*[21]; and the accused was justified in preventing him forcibly from consummating that mischief in defence of the property of his master Ramana Goundan. The accused has, however, clearly exceeded the right of private defence and therefore his act falls within *Exception* 2 to section 300, Indian Penal Code.

The net result of this analysis is that the conviction of the accused under section 304 (Part II), Indian Penal Code, is correct and the sentence is appropriate. There are no grounds to interfere with the conviction and sentence.

There are no merits in the State appeal against Accused-2 for the reasons set out above. These appeals by the State is dismissed.

V.S. ——— *Appeals dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Pena Parayan Ambalam ... *Appellant**

v.

Venkatachalam Chettiar and others ... *Respondents.*

Limitation Act (IX of 1908), section 17—Applicability to assignee of person disabled—Section 19—"Acknowledgment"—Statement about subsisting mortgage in sale proclamation by decree-holder—Property purchased in auction by mortgagee—Effect—Acknowledgment of mortgage debt.

Section 17 of the Limitation Act can be invoked only by the actual person disabled and not by his assignee. It is a purely personal exemption which will not apply to the assignee.

Thayammal v. *Rangaswami*, (1955) 2 M.L.J. 426 : I.L.R. (1956) Mad. 182, followed.

Obiter.—An acknowledgment or statement in a sale proclamation about the subsisting character of a mortgage by the decree-holder who becomes ultimately the auction-purchaser and purchases the property for a low value on the ground that the purchase is subject to the subsisting mortgage would operate as an acknowledgment to save limitation in so far as that mortgage is concerned.

Jugal Kishore v. *Fakhruddin*, (1906) I.L.R. 29 All. 90; *Krishnayya* v. *Venkatappayya*, A.I.R. 1925 Mad. 134; *Fakirchand Janakiram* v. *Narmada Bai*, I.L.R. (1943) Bom. 701 and *Fakirchand* v. *Narmada Bai*, A.I.R. 1948 Bom. 125, referred to.

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1. A.I.R. 1948 Oudh. 97.
2. A.I.R. 1915 All. 464.
3. A.I.R. 1949 Cal. 237.
4. (1948) 1 M.L.J. 330 : 61 L.W. 331: 1949 M.W.N. 368 : A.I.R. 1948 Mad. 473.
5. A.I.R. 1955 Tripura 1.
6. A.I.R. 1953 Sau. 158.
7. 1956 W.R. 784.
8. A.I.R. 1957 All. 405.
9. A.I.R. 1957 Cal. 385.
10. A.I.R. 1958 Cal. 668.
11. A.I.R. 1958 Raj. 347.
12. (1876) 1 Mad. 262 (F.B.).
13. (1939) 1 M.L.J. 445 : 49 L.W. 298 : 1939 M.W.N. 121 : A.I.R. 1939 Mad. 794.
14. 1923 M.W.N. 634 : A.I.R. 1924 Mad. 176.
15. A.I.R. 1940 Mad. 306.
16. (1898) 1 Weir 505.
17. 11 L.W. 148 : 1920 M.W.N. 131.
18. (1922) 44 M.L.J. 434 : 16 L.W. 793 : 1922 M.W.N. 839.
19. 21 L.W. 641 : 1925 M.W.N. 45 : A.I.R. 1925 Mad. 577.
20. (1911) 2 M.W.N. 349.
21. (1920) 13 L.W. 266.

*S.A. No. 385 of 1957.

16th April, 1959.
(26th Chaitra 1881-Saka.)

Appeal against the Decree of the Court of the Subordinate Judge of Madurai, in Appeal Suit No. 52 of 1956, preferred against the Decree of the Court of the District Munsif of Melur, in Original Suit No. 206 of 1955.

M. Natesan, for Appellant.

C. S. Rajappa, for K. Desikachari, R. L. Hanumantha Rao and *T. V. Balakrishnan,* for Respondents.

The Court delivered the following

JUDGMENT.—There is much substance in the contention raised by Mr. Natesan that an acknowledgment in a sale proclamation about the subsisting character of a mortgage by the decree-holder who ultimately became an auction-purchaser and purchased the property for low value on the foot that it was being bought subject to the subsisting mortgage would operate to save limitation in so far as that mortgage is concerned. In this contention he is supported by the decision of this Court in *Krishnayya* v. *Venkatappiah and others*[1], the decision of the Allahabad High Court in *Jugal Kishore* v. *Fakhruddin*[2], and a decision of a single Judge in Bombay High Court in *Fakirchand Janakiram* v. *Narmada Bai*[3]. The learned advocate rightly points out that the decision of Lukur, J., was subsequently reversed in a Letters Patent Appeal reported in *Fakirchand Janakiram* v. *Narmada Bai*[4]. If I have to decide this matter, I shall be greatly inclined to uphold the contention of Mr. Natesan that the statement in the sale proclamation by the decree-holder who became ultimately the auction-purchaser and the purchase is on the foot of the statement would operate as acknowledgment to save limitation.

But, unfortunately, even if I hold this point in favour of Mr. Natesan, he has got other obstacles in the way, namely, that after allowing for the period of time saved by Ordinance V of 1953 this suit should have been filed on 16th November, 1953, instead of on 1st July, 1955, as has been done.

The appellant has, no doubt, sought to invoke the aid of section 17 of the Limitation Act. But it is now settled law that it can be invoked only by the actual person disabled and not by the assignee, Vide *Thayammal* v. *Rangaswami*[5]. It is a purely personal exemption which will not apply here.

This Second Appeal fails and is dismissed, but without costs. No leave.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

S. A. M. Mahamed Ibrahim and another .. *Petitioners**

v.

The Estates Abolition Tribunal, Vellore .. *Respondent.*

Madras Estates (Abolition and Convertion into Ryotwari) Act (XXVI of 1948), *section* 15 (2)—*Applicability—Order of settlement officer not served on landlord as required by rule* 6 (*b*) *of the Rules under section* 67—*Effect—Appeal filed beyond six months—Rejection—Propriety—Power of Tribunal to excuse delay—Issue of writ of* mandamus.

Although normally the power of the Estates Abolition Tribunal to excuse the delay in the filing of an appeal is limited to those cases in which the delay does not exceed 6 months from the date of the Order, that is dependent upon the terms of the statute and the rules being complied with as regards the manner of service of the order appealed against. Where there has been a failure to obey the statutory direction contained in rule 6 (*b*) of the Rules framed under section 67 of the Act and a copy of the order has not been served on the landholder or sent to him by post as required by that rule, he cannot be bound by the order and the aggrieved landlord's right cannot be barred merely because the date which the order bears is more than six months from the date of the filing of the appeal. The order would become an operative order which would be final in the absence of an appeal only when

1. A.I.R. 1925 Mad. 134.
2. (1906) I.L.R. 29 All. 99.
3. I.L.R. (1943) Bom. 701.
4. A.I.R. 1948 Bom. 125.
5. (1955) 2 M.L.J. 426 : I.L.R. (1956) Mad. 182 : A.I.R. 1956 Mad. 15.

*W.P. No. 290 of 1958. 8th September, 1959. (17th Bhadra, 1881 Saka.)

served upon the parties named in rule 6 (*b*). In such a case the Tribunal would not be justified in rejecting the appeal filed beyond six months of the date of the order. A writ of *mandamus* will therefore issue to the Tribunal directing it to restore the appeal to its file and dispose of it in accordance with law.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent the Estates Abolition Tribunal, Vellore to entertain the Appeal No. 136 of 1957.

M. R. N. Abdul Karim, for Petitioners.

The Additional Government Pleader (*M. M. Ismail*), for the Respondent.

The Court made the following

ORDER.—This is a petition for the issue of a writ of *mandamus* directing the Estates Abolition Tribunal to entertain Appeal No. 136 of 1957 and dispose of it in accordance with law.

A few facts are necessary to be stated to understand how a relief of this nature comes to be claimed. The village of Eripurakarai in Pattukottai taluk, Tanjore District, was notified as an inam estate and taken over by the Government under Madras Act (XXVI of 1948) on 1st October, 1951. The petitioners who are the ex-inamdars of this village filed an application on 23rd December, 1955, before the Additional Assistant Settlement Officer, Pattukottai, claiming ryotwari pattas under section 13 (*a*) (i) of the Act in respect of 8 items. The petitioners are two in number and it is stated that they were carrying on business in Ceylon while their family has been permanently residing in Adirampattinam near Pattukottai. The Assistant Settlement Officer took up the petitioner's application for enquiry on 26th April, 1956 and pronounced an order disallowing the petitioner's claim on 11th July, 1956.

In this order he states :

"The prescribed notice has not been served on both the petitioners as they are reported to be in Ceylon and published in the village in time and according to rules. In response to the notice none has come forward to oppose the claim of the petitioners. The first petitioner's brother-in-law is reported to be in the village supervising the lands of the petitioners but inspite of best attempts to have the notice served on him it could not be done as his presence could not be secured by the Karnam."

It was thus an *ex parte* enquiry that was held, that is in the absence of the applicant and in the absence of any evidence led by him.

It is stated in the affidavit in support of this petition that though the families of the petitioners were residing in Adirampattinam, at an address well known to the Karnam, no steps were taken to inform the members of their families or give them a copy of the notice of the hearing. Allegations are made in the affidavit regarding the inimical relationship between the petitioners and the Karnam as the reason why no notice was served upon them and the statement made regarding the impossibility of serving notice upon the members of the petitioners' families.

The order of the Assistant Settlement Officer disallowing the claim of the petitioners was on 11th July, 1956. At this date, it is said, the petitioners were in Ceylon. No copy of the order was served upon the petitioners or sent to them by registered post. Rule 6 framed under section 67 read with section 15 of the Act enjoins upon the Settlement Officer the obligation to deliver or serve a copy of his order on the petitioner and each respondent. Rule 6 (*b*) runs :

"A copy of the decision in full shall be delivered to the landholder if he is present or sent to him free of costs by registered post acknowledgment due sent to the manager of the estate".

This was not done.

It is said in the affidavit that the petitioners came to know of the disposal of their application only in May, 1957, when one of the petitioners returned to India, and that immediately thereafter he applied for a copy of the order and filed an appeal before the Estates Abolition Tribunal on 4th June, 1957, with a petition for

condoing the delay, if any, in preferring the appeal. The Tribunal, however, dismissed the appeal as barred by limitation, having also dismissed the application for excusing the delay.

It is the legality of this order of the Estates Abolition Tribunal that is challenged in this petition.

Now the first question for consideration is whether the Tribunal was justified in rejecting the appeal of the petitioners on the ground that it was barred by limitation. The Tribunal took no account of the fact that the Assistant Settlement Officer had failed to conform to the requirements of rule 6 (*b*) which I have set out earlier under which he was directed to serve a copy of the order upon the landholder or to send him the same by registered post if the same could not be delivered to him personally. Section 15 (2) of the Act, which provides for appeals to the Tribunal against the orders of the Assistant Settlement Officers enacts :—

"Against the decision of the Settlement Officer under sub-section (i) any person aggrieved by such decision may, within two months from the said date, appeal to the Tribunal, provided that the Tribunal may in its discretion allow further time not exceeding 6 months for the filing of any such appeal".

The interpretation that the Tribunal placed upon this provision was that their power to excuse delay in the filing of the appeal was limited to those cases where the delay did not exceed 6 months from the date of the order. It is no doubt so. But this is dependent on the terms of the statute and the rules being complied with as regards the manner of service of the order appealed against. In my judgment where there has been a failure to obey the statutory direction, it would not be consonant with principle to hold that a person could be affected by an order of which he had no notice delivered on him in the manner provided by statute. This might be tested by taking an extreme case where the Settlement Officer passes an order but he keeps it with himself and does not communicate it to any of the parties mentioned in rule 6 (*b*). In such a case it could not be contended that the right either of the Government or of an aggrieved person should be barred because the date which the order bears is more than 6 months from the date of the filing of the appeal. On a proper construction of rule 6 (*b*) I am inclined to hold that the order would become an operative order which would become final in the absence of an appeal only when served upon the parties named in rule 6 (*b*). In this view I hold that the Tribunal was not justified in rejecting the appeal of the petitioners and they committed an error in doing so.

The order of the Tribunal dismissing the appeal, A.S. No. 136 of 1957, is set aside, and the rule is made absolute. The Tribunal will restore the appeal to its file and dispose of it in accordance with law. As there has been no enquiry by the Assistant Settlement Officer in the presence of the landholders and as it would be necessary that they should be given an opportunity to adduce such evidence as they choose, to establish their claim to patta, the Tribunal is directed to remand the proceeding to the Assistant Settlement Officer for an enquiry and decision. There will be no order as to costs.

P.R.N. — *Order set aside.*
Rule made absolute.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction.]

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Panchapakesa Iyer .. *Petitioner**

v.

Subramania Moopan and others .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 4 (1) and (2)—Applicability.

Restoration to possession of a cultivating tenant under section 4 (1) of the Madras Cultivating Tenants' Protection Act will be barred only if such restoration is not possible as a result of another

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* Writ Petition No. 57 of 1957. 2nd September, 1959. (11th Bhadra, 1881—Saka).

tenant being in *bona fide* possession of the land and who does not fall within the terms of the proviso. Where some other tenant enters into possession of the land but surrenders possession and clears out before the application by the former tenant for restoration to possession there is no bar to an application under section 4 (1) of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order in R.A. No. 81 of 1956 on the file of the 2nd Respondent, dated 27th July, 1956 and quash the said order made therein.

A. V. Narayanaswami Iyer, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for the Respondents.

The Court made the following

ORDER.—The order impugned in this writ petition for the issue of a writ of *certiorari* is that of the Revenue Court which directed restoration to possession under section 4 of the Madras Cultivating Tenants' Protection Act, 1955 (Act XXV of 1955). The first respondent alleged that he had been cultivating the land of an extent of 2 acres and 42 cents in the village of Allur, Tiruchirappalli taluk.

The petitioner is the owner of the land now in controversy. The first respondent, Subramaniam, was in possession of this land as a cultivating tenant on 1st December, 1953. He filed an application out of which the present proceedings arise, R.A. No. 81 of 1956, in the Revenue Court, Tiruchirappalli, for restoration to possession of his holding under section 4 (1) of the Madras Act (XXV of 1955). The petitioner resisted this application but the same was allowed by the Revenue Court and it is the validity of this order that is challenged in this petition. A few facts are necessary to be stated to appreciate the point raised in the petition. The first respondent alleged that he was in possession of the land as a cultivating tenant on 1st December, 1953, the date which is crucial for the application of section 4 of the Cultivating Tenants' Protection Act. The landlord denied it and stated one Sangili was the person then in possession. The Revenue Court, however, has found as a fact that the case set up by the landlord was not true and this being a finding of fact this contention has not been repeated before me. The petition must, therefore, proceed on the basis that the first respondent in whose favour of Revenue Court has passed an order was in possession of the property in dispute on 1st December, 1953. He continued to be in possession till 24th June, 1955, when by an order of a Magistrate under section 145, Criminal Procedure Code, the lands were attached. Subsequently the landlord died on 13th July, 1955. Meanwhile when the lands were under attachment and were in the hands of the receiver appointed by the Magistrate they were leased to one Murugan for a period of one year. Murugan relinquished possession of the land at the end of the term in or about February, 1956. It was thereafter that the first respondent, the previous cultivating tenant filed this petition for restoration to possession. Section 4 of the Act under which this application was made runs:—

Section 4 (1) : " Every cultivating tenant who was in possession of any land on the 1st December, 1953 and who is not in possession thereof at the commencement of this Act shall, on application to the Revenue Divisional Officer, be entitled to be restored to such possession on the same terms as those applicable to the possession of the land on the 1st December, 1953 ".

As the learned counsel for the petitioner relied on the terms of section 4 (2) I will set out portions of that sub-section which are material to the present case.

Section 4 (2): "Nothing in sub-section (1) shall be deemed to entitle any such cultivating tenant to restoration of possession.... (iii) if subsequent to 1st December, 1953, the landlord has *bona fide* admitted some other cultivating tenant to the possession of land and such other tenant has cultivated the land before the commencement of this Act:

Provided that where such other tenant is in possession either as owner or as tenant or as both of any other land which exceeds the extent specified in the *Explanation* below and the cultivating tenant who was evicted is not in possession of any land or is in possession of any other land which is less than the extent specified in the said *Explanation*, the cultivating tenant shall be entitled to restoration of possession."

The respondent was not represented at the hearing and the petition was heard *ex parte*. Mr. Narayanaswami Iyer, learned counsel for the petitioner, urged two points in support of his contention that the order of the Revenue Court was erroneous and without jurisdiction. The first was that the first respondent did not satisfy the terms of section 4 (1) as a person who was not in possession thereof at the commencement of this Act that is 27th September, 1955, because he ceased to be in possession by reason of the order of the Magistrate and not by reason of any eviction by the landlord. For this purpose learned counsel relied on the judgment of this Court in *Kuppammal* v. *Vellingiri Gounder*[1]. I however, consider that the decision does not render the dispossession of the first respondent (cultivating tenant) in this case outside section 4 (1). The petitioner is relying upon a lease effected by the receiver appointed by the Magistrate after attachment as if it were one by himself and it is on this basis that the argument about the applicability of section 4 (2) was rested. It cannot be that the receiver represented the landlord for the purpose of admitting the second counter petitioner to possession but that the receiver who came into being by an order of the Magistrate would not represent the landlord for the purpose of dispossessing the first respondent from possession. It is not anybody's case at least now that the first respondent surrendered possession. In those circumstances I consider that the case of the respondent falls within the terms of section 4 (1) of the Act and that he is entitled to the protection afforded by that provision.

The second point urged was that subsequent to 1st December, 1953, that is in or about 1955 after the receiver appointed by the Magistrate took possession there was a lease of the land under which some other cultivating tenant was admitted to possession of the land and that such other tenant had cultivated the land before the commencement of the Act. It was urged that Murugan the person so admitted was a cultivating tenant and that he did not fall within the Proviso of section 4 (2) (iii) and that his admission to tenancy, even though he relinquished possession of the land subsequently, was a bar to the restoration of possession. I feel unable to accede to this argument either. I am inclined to read section 4 (2) (iii) as meaning that restoration to possession of a cultivating tenant will not be possible if there is another tenant who is *bona fide* in possession of land and who does not fall within the terms of the Proviso. If therefore the tenant had relinquished possession before the date of the application for restoration to possession there is no bar to the application of section 4 (1).

The language of the Proviso in speaking of the other tenant uses the present terms " is in possession as owner or as tenant " indicates that it is the present possession of the land of such a *bona fide* tenant that constitutes the bar and not the possession of some tenant who enters upon the land cleared out before the date of the application. In my judgment there are no merits in this petition which fails and is dismissed. The rule *nisi* will be discharged.

R.M. *Rule* nisi *discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

The State of Madras represented by the Collector of Madras and another .. *Appellants**

v.

B. G. P. Lorry Service and another .. *Respondents.*

Workmen's Compensation Act (VIII of 1923), section 8 (1)—Compensation for injury resulting in death of workman —Direction to deposit—Payment directing to the party claiming—If sufficient discharge of the liability.

Where the Commissioner for Workmen's Compensation makes an order under the Workmen's Compensation Act, directing an employer to deposit the compensation amount due in respect of an

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1. (1957) 1 M.L.J. 293.

*W.A. No. 3 of 1957. 16th November, 1959. (25th Kartika, 1881—Saka.)

accident caused to a workman resulting in his death is not a sufficient discharge of the liability of the employer if the compensation is paid directly to any person. The reason is that the term dependent under the Act includes several relations of the deceased workman, who may not strictly be heirs of the deceased under the personal law applicable to him; and, the Commissioner is expected to safeguard the interests of all the dependants. Hence the payment of the compensation amount, directed to be deposited to the widow of the deceased workman, would not amount to a discharge of the liability of the employer and the Commissioner is entitled to take proceedings to recover the amount from the employer notwithstanding such payment.

Appeal under Clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopala Ayyangar, dated 11th September, 1956 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 519 of 1955, presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the respondents Nos. 1 and 2 from taking any coercive steps under the Revenue Recovery Act in pursuance of the order of the Additional Commissioner for Workmen's Compensation for the recovery of the sum of Rs. 1,214 awarded in W.C. No. 471 of 1954, dated 21st December, 1954.

The Additional Government Pleader (*M. M. Ismail*), for Appellants.

N. C. Raghavachari and *V. Devarajan*, for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopala Ayyangar, J., in Writ Petition No. 519 of 1955, filed in the following circumstances. One D. Ramalingam, a workman employed as a cleaner by B. G. P. Lorry Service, Wall Tax Road, Madras, received a fatal injury by accident on 15th May, 1954, in the course of his employment. He actually died on 19th May, 1954. His widow, Papathi Ammal, filed an application in the prescribed form before the Commissioner for Workmen's Compensation, praying for the award of compensation. The heading of the form itself is "Application for Order to Deposit of Compensation". The Additional Commissioner for Workmen's Compensation, Madras, overruling the objections raised by the employer, held that a compensation of Rs. 1,200 was payable. He ordered that the employer should deposit the compensation of Rs. 1,200 together with costs amounting to Rs. 14. The employer did not deposit the amount with the Commissioner, as directed. He is said to have paid that amount in person to the widow on 23rd April, 1955. In May, 1955, the Commissioner took proceedings against the employer for the recovery of the sum which was directed to be deposited. The employer protested on the ground that the payment had been made to the widow and the claim was discharged. But the Commissioner held that, under section 8 of the Workmen's Compensation Act, the liability to deposit the amount subsisted until the amount was actually deposited. Thereupon, the employer, B.G.P. Lorry Service, field a petition under Article 226 of the Constitution for the issue of a writ of prohibition, restraining the Commissioner from taking coercive steps for the recovery of the sum of Rs. 1,214.

The learned Judge who heard the writ petition allowed it without entering into the question as to whether the provisions of section 8 of the Act are directory or mandatory. He was of opinion that, as the proceeds of the recovery were to be held for the benefit of the claimant, the authorities could not start recovery proceedings without being moved by a party who had not been paid. The State of Madras represented by the Collector who was taking the coercive proceedings and the Additional Commissioner for Workmen's Compensation, Madras, are the appellants before us.

With respect to the learned Judge, we cannot agree with him. He has overlooked several facts and relevant provisions of the Workmen's Compensation Act. The learned Judge assumed that the only dependent was the widow. But it appears from the very application made by the widow that she has three children. He also appears to have overlooked the fact that the order of the Additional Commissioner was not to pay the amount of Rs. 1,214 to the widow, but to deposit the money with the Commissioner. The learned Judge refers to the claim being discharged. That is also not correct, because, under the Act, a payment outside in person will not dis-

charge the claim. He further considered that the authorities could not start recovery proceedings without being moved by a party who had not been paid. This, again, is based on the wrong conception that a party may be paid in person. There is no provision in the Act which contemplates an application by a party to move the authorities to recover the amount of compensation by resort to the machinery of the Revenue Recovery Act. Section 8 (1) of the Act lays down in unequivocal terms that no payment of compensation in respect of a workman whose injury has resulted in death and no payment of lump sum as compensation to a woman or a person under a legal disability shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation. Under sub-section (3) of the same section, it is the receipt of the Commissioner which is a sufficient discharge in respect of any compensation deposited with him. Under sub-section (5), compensation deposited in respect of a deceased workman, shall, subject to certain deductions mentioned in sub-section (4), be apportioned among the dependents of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependent. Sub-section (7) provides, that, where any lump sum deposited with the Commissioner is payable to a workman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct. Sub-section (8) confers power on the Commissioner to vary a prior order as regards the disposal of the compensation amount. Section 31 authorises the Commissioner to recover as an arrear of land revenue any amount payable by any person under the Act,

From the above provisions, it is clear that the Act does not contemplate a payment of compensation by the employer to any party in person as sufficient discharge of his liability. The reason is fairly obvious. The Commissioner is expected to safeguard the interests of all the dependents of a deceased workman. The definition of 'dependant' includes within the meaning of the term several relatives of a deceased workman who may not be heirs under the law applicable to him. As we have pointed above, the Commissioner is given unfettered discretion to apportion the amount of compensation among the dependants; that is to say, he is not bound by the rules of the personal law of the deceased workman. In the case of a woman, the Commissioner is bound to invest the amount of compensation. When these are the provisions of the Act, we cannot agree with the learned Judge that the payment of the compensation amount in person to a woman, that is, the widow of the deceased workman, especially when, even according to her own statement, she has three children, is a sufficient discharge. An analogy may be given from the Land Acquisition Act. Under section 31 (2), if there is no person competent to alienate the land, or, if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector is bound to deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted. If the Collector, in contravention of this provision, pays over the amount in such circumstances to a party, it cannot be said that the Government obtains a valid discharge. Sections 32 and 33 provide for investment of the compensation amount after deposit into Court, just as the Workmen's Compensation Act also provides for investment of monies payable to a woman or a person under a legal disability. Of course, when a workman is injured, but not fatally, the only person entitled to compensation would be the workman. There is no question then of deposit to be made with the Commissioner. But, if the injury to the workman results in his death, then, questions would arise as to the dependants who would be entitled to the compensation. Hence the provision in sub-section (1) of section 8 that no payment of compensation in respect of a workman whose injury has resulted in death shall be made otherwise than by deposit with the Commissioner.

In this view, the appeal is allowed, and the Petition filed by the 1st respondent under Article 226 of the Constitution is dismissed.

There will be no order as to costs.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

Qhamrunissa Begum .. *Petitioner**

v.

Fathima Begum and others .. *Respondents.*

Madras Court-Fees and Suits Valuation Act (XIV of 1955), *section* 37 (2)—*Suit by a Mahomedan cosharer for partition—Claim of share in properties on the basis that they are joint properties though put in the name of defendants—Court-fee if should be paid on the market value of the shares claimed.*

Where a plaintiff, a Mohamedan co-sharer, claims partition and possession of his share in the estate of a deceased on the footing that though several items of properties were standing in the name of other co-sharers they really belong to the estate of the deceased, he could value the relief under section 37 (2) of the Madras Court-fees and Suits Valuation Act. So long as there is no allegation in the plaint that any of the co-sharers were claiming any item adversely to the others, the plaintiff should be deemed to be in joint possession of the same. Where the plaintiff claims his share of moneys standing in the name of defendants on the allegation that they were put in their name nominally and they were for the benefit of the family the suit would fall under section 37 (2) of the Act and the plaintiff need not pay Court-fee on the value of his share.

Sri Rama v. *Lakshmidevamma*, (1955) Andh.W.R. 348, referred.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Sixth Assistant City Civil Judge, Madras, dated 26th April, 1958 and made in O.S. No. 2917 of 1955.

S. K. Ahmed Meeran, for Petitioner.

T. S. Krishnamurthi Ayyar, N. C. Raghavachari and *S. V. Kumaraswami*, for Respondents.

G. Ramanujam, for the Additional Government, Pleader (*K. Veeraswami*) on notice from Court in both Petitions.

The Court made the following

ORDER.—C.R.P. No. 1167 of 1958 is a petition to revise the order of the City Civil Judge in O.S. No. 2917 of 1955 holding that the plaint has not been properly valued and that the plaintiff should pay Court-fee on the market value of five items of properties, namely, items, 5, 10, 11, 17 and 18 of Schedule B to the plaint. The suit was one for partition between certain Muhammadan co-sharers of the estate of one Mohamed Ahmathulla Badsha Sahib, who died on 4th January, 1955. Defendants 1 to 8 are the co-sharers. Defendants 9 to 11 are the children of the 4th defendant, one of the co-sharers. They are strangers so far as the partition of the property is concerned. The plaintiff claims 21/192 share. There is no dispute about the shares of the various parties. The immoveable properties consisted of 9 items of properties. It is admitted that they all belonged to the estate of the deceased. C Schedule comprised outstanding due to the estate and there is no dispute in regard to that. B Schedule comprises moveable properties. The items to which I have made reference are items standing in the names of the various defendants in the books of the deceased.

The case for the plaintiff, who is the petitioner here, is that these items of properties though put in the names of the various defendants belonged to the deceased and as such are divisible between the sharers in proportion to the shares. There is no indication in the plaint that there is any adverse claim by the strangers in regard to the said items except in regard to a part of item No. 11. That comprises a sum of Rs. 6,000 standing in the names of defendants 9 to 11 in the books of the deceased. The plaintiff valued the plaint under section 37 (2) of the Court-Fees Act, 1955, and paid Court-fee as if he was entitled to a partition in respect of the properties in the joint possession of all the co-sharers.

Objection was taken on the side of defendants to the correctness of the Court-fee paid. The learned City Civil Judge held that the valuation in regard to the

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*C.R.P. Nos. 1167 and 1734 of 1958. 7th April, 1959.
(7th Chaitra 1881—Saka.

other items of properties was correctly made and that the valuation adopted in respect of items 5, 10 17 and 18 of B Schedule was not correct and the plaintiff should pay the Court fee on the amount claimed. This order cannot be sustained. The plaintiff does not allege in the plaint that any stranger to the family is interested in the money except in regard to a sum of Rs. 6,000, which stands in the name of defendants 9 to 11. In regard to the other items of properties she states that the moneys belonged to the deceased but were put in the books of the family in the names of the various defendants, who were holding it only on behalf of the family having no interest therein apart from being a co-sharer to the estate of the deceased. Under those circumstances I cannot understand how the plaintiff could be asked to pay the Court-fee in respect of this sum of money on the footing that it is a claim against the persons holding adversely to the co-sharers. According to the allegation in the plaint, moneys were standing in the names of persons, who were co-sharers, and it should be deemed to be that the plaintiff is in joint possession of those sums along with the respective defendants. Therefore, the valuation under section 37 (2) would be correct in regard to them.

Mr. G. Ramanujam, who appeared for the Additional Government Pleader, has sought to support the judgment of the lower Court by reference to the decision of the Andhra High Court reported in *Srirama* v. *Lakshmidevamma*[1]. In that case a suit was filed for reopening of a partition on the ground that the previous partition was effectuated by fraud. The plaint stated the widow of the other deceased co-sharer was in possession of the property setting up an adverse claim to the same. The widow in that case was not a co-sharer with the plaintiff, as the deceased co-sharer had executed a will in respect of his share of the property in favour of his adopted son, the 2nd defendant in the case. Therefore, when the plaint stated that the widow of the deceased was in possession of the property adversely, it meant that the widow was not holding the property as a co-owner along with the others but in her own independent right adversely to all the co-owners. The learned Chief Justice of the Andhra High Court held that for ascertaining the Court-fee payable on the plaint the terminology used in the plaint could not be decisive, but the substance of the plaint had to be looked into and that a suit for partition and separate possession of the plaintiff's share, whether he was in actual or constructive possession of family properties, was incapable of valuation and therefore chargeable only with a fixed fee. But in a case where the plaintiff was not in such joint possession he had to value the suit as one for possession. The learned Chief Justice also observed at page 202 as follows :

> " It is a common phenomena among joint family that the properties are purchased sometime for various reasons, in the names of female members of the family, but the fact does not make the properties any the less joint family properties. If a member of the family files a suit for partition on the basis that the family is in possession of those properties, the plaintiff can pay Court-fee under section 17-B of Schedule II of the Court-fees Act."

But in that case the widow was admittedly in possession of the properties claiming them to be her own properties to the exclusion of the plaintiff. It was held that the plaint had got to be valued as one for recovery of possession. In the present case the claims in respect of moneys in the names of defendants are against the members of the family on the allegation that they were put in their names benami nominally and they were for the benefit of the family. Under those circumstances on a fair reading of the plaint it follows that the plaintiff did not assert that the various members in whose names the moneys were kept, were claiming adversely to the family. But on the other hand the averment was that the moneys of the family were merely put in their names and that all the members of the family should be deemed to be in possession of the same. Under those circumstanes it would be sufficient for the plaintiff to pay the fixed Court-fee under section 37 (2) of the Court-fees Act. Mr. N. C. Raghavachari, learned advocate for the 6th defendant, contends that while that may be so in regard to the other items of moneys, as regards the sum of Rs. 6,000 out of Rs. 7,750 claimed as item No. 11 in Schedule B that

1. (1955) An.W.R. 348 : A.I.R. 1955 Andh. 200.

principle would not apply. This sum of Rs. 6,000 is found in the books of the deceased in the names of defendants 9 to 11. The relevant averment in the plaint is contained in paragraph 4. They are in these words :

" The plaintiff also understands that a sum of about Rs. 600 and Rs. 2,000, Rs. 2,000, Rs. 2,000 were also entered in the account books of the lungi business in the names of the defendants 7 and 9, to 11 respectively. Defendants 9 to 11 are grand-daughters of the said Mohammed Azmathulla Badsha Sahib through his daughter the 4th defendant. The plaintiff states that whatever sums stand to the credit of defendants 7 and 9 to 11 in the said books of account either as capital or loan really belonged only to the plaintiff's father and hence they form part of the divisible assets among his heirs. Not one of the said defendants 6, 7 and 9 to 11 had the means to contribute the sums standing to their respective credit in the said books of account."

I have already pointed out that defendants 1 to 8 were the co-sharers along with the plaintiff in regard to the estate of the deceased. Defendants 9 to 11 were the daughters of the 4th defendant, and though they are not co-sharers they would be members of the family. In such a case the observations of the learned Chief Justice of the Andhra High Court, which I have extracted above, would apply, as the plaint merely says that although these moneys were kept in the names of the various members of the family, they still formed part of the assets of the family. There is no allegation in the plaint to warrant an inference that defendants 9 to 11 were claiming adversely to the family. Under those circumstances I am of opinion that the valuation of the claim adopted by the plaintiff is correct and that the order of the lower Court directing her to pay Court-fee with reference to her share of the various items could not be sustained. It is set aside. The learned City Civil Judge has directed the plaintiff to pay Court-fee on the market value of items 1 to 36 in E Schedule after stating their value. I cannot understand how the learned City Civil Judge persuaded himself to direct the plaintiff to pay Court-fee in regard to 36 items set out in E Schedule to the plaint. The plaintiff seeks no relief in regard to E Schedule and it is stated by all the parties that no Court-fee need be paid for E Schedule, as no relief was prayed for in respect of that schedule.

It follows that the order directing defendants 4 and 7 to 11 to pay Court-fee on the valuation adopted by the learned Judge cannot be sustained. It is stated that they have already paid Court-fees in accordance with section 37 (3) of the Court-fees Act. The Civil Revision Petitions are allowed. No order as to costs.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

Thalai Vadivu Anandar .. *Appellant**

v.

Venugopala Chettiar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1947), *section* 7—*Applicability to decrees in ejectment made before the Act.*

It is not correct to say that section 7 of the Madras Buildings (Lease and Rent Control) Act would apply only to cases of decrees in ejectment passed after the coming into force of the Act. The section prohibits eviction of tenants in execution of decrees whether the same is made before or after the Act and whether the decree is based on a compromise or after contest. Where an execution petition is filed after the coming into force of the Act the tenant could invoke the protection under section 7.

Appeal under clause 15 of the Letters Patent against the Judgment and Order of the High Court, dated 18th February, 1955 and made in A.A.A.O. No. 130 of 1954 (A.S. No. 261 of 1954, Sub-Court, Tiruchirapalli; E.P. No. 240 of 1955, in O.S. No. 675 of 1952, District Munsiff's Court, Tiruchirappalli.)

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* L.P. Appeal No. 38 of 1955. 4th September, 1959. (13th Bhadra 1881—Saka.)

A. V. Narayanaswami Ayyar, S. Amudachari and *A. V. Raghavan,* for Appellant.

T. R. Srinivasan, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This Appeal against the Judgment of Panchapakesa Ayyar, J., in C.M.S. A. No. 130 of 1954 arises in the following circumstances. One Marudappa Chettiar filed O.S. No. 675 of 1952 in the Court of the District Munsif, Tiruchirapalli, against Venugopala Chettiar, the respondent herein, for recovery of possession of the property in dispute and for past and future rents. In that suit the parties entered into a compromise and based on that compromise the Court passed a decree directing the respondent herein to deliver possession of the property by 15th March, 1954 and also to pay past and future rents. As the respondent failed to deliver possession by the prescribed date, the plaintiff-decree-holder filed E.P. No. 240 of 1954 on 18th March, 1954, for delivery of possession. An order for delivery was passed on 12th April, 1954, directing delivery by 10th Jnne, 1954. On 15th April, 1954, the respondent filed an appeal to the District Court, Tiruchirapalli, against the order for delivery (A.S. No. 177 of 1954). In that appeal he obtained on *ex parte* order of stay on 15th April, 1954, itself. On 27th May, 1954, the original decree-holder Marudappa Chettiar died. On 8th July, 1954, the District Court dismissed A.S. No. 177 of 1954 on the ground that the order of delivery was right. The learned Judge *inter alia* observed as follows :—

"The right given to a tenant by section 7 of the Act is a substantive right and there is nothing in the Act to indicate that it is retrospective in the application. Therefore, there can be no question of applying the provisions of the Act, so as to hold that the order of delivery passed against the appellant is wrong. It is urged that section 7 not merely vests a right in the appellant but prohibits the Court from evicting him. If that is so, it is for the appellant to ask the Court which is threatening to evict him to stay his hands (whether it is bound to do so or not is not a matter on which I am expressing any opinion) ; not to come in appeal against an order which is perfectly proper and legal.

Apparently the view taken by the learned District Judge was that section 7 of the Madras Buildings (Lease and Rent Control) Act would not make the original order for possession *ipso facto* invalid, but it might be that the judgment-debtor could object to actual eviction in pursuance of the order. After the dismissal of his appeal the respondent filed an application, E.A. No. 845 of 1954 on 12th July, 1954, for stay of execution. Meanwhile the son of Marudappa Chettiar, the present appellant before us, filed an application on the same day that he may be added as legal representative of the decree-holder praying for a decree directing delivery of possession of the suit property to him. The ground taken by the respondent was that the Rent Control Act had been extended to the village in which the property was situated on and from 16th June, 1954 and therefore the decree-holder's legal representative could not evict him. The learned District Munsif of Tiruchirapalli overruled the respondent's objection and brought the appellant before us as the legal representative of the deceased decree-holder and passed again another order for delivery of possession to the legal representative. Against this order of the District Munsif the respondent filed an appeal, A.S. No. 261 of 1954 which was heard and disposed of by the learned Subordinate Judge of Tiruchirapalli. He dismissed the appeal on the ground that section 7 of the Act would not apply to pending execution proceedings, that is to say, to the prior execution petition wherein an order for eviction had already been passed. From this order the respondent preferred an appeal to this Court, C.M.S.A. No. 130 of 1954 which came up for decision before Panchapakesa Ayyar, J. The only question argued before him was whether the Rent Control Act whose application had been extended to the village in which the property was situated only on 16th June, 1954, would prevent the eviction of Venugopala Chettiar except in accordance with section 7 of that Act. The learned Judge after an elaborate discussion of the several decisions cited before him held that section 7 of the Act does apply and is a complete answer to the claim of the decree-holder's legal representative to evict the respondent. The learned Judge therefore allowed the appeal and dismissed the execution petition filed by the decree-holder's legal representative but granted leave to file a Letters Patent Appeal.

Mr. A. V. Narayanaswami Ayyar, learned counsel for the appellant, contended, relying upon the well-known rule against implying retrospective operation of statutes, that section 7 of the Act would only apply to decree passed in suits filed after the passing of the Act. In this case admittedly the decree was passed long before the Act, and even an execution petition had been filed before the Act came into force. We cannot agree with this contention of learned counsel for the appellant. No authority has been cited to us for this extreme position that section 7 would not apply except to decrees passed in suits filed after the passing of the Act. On the other hand a Division Bench of this Court held in *Sukri Sahib* v. *Madhava Kurup*[1], that a provision similar to section 7 of the Act of 1949 might bar the eviction of a tenant in execution of a decree passed in a suit filed before the concerned statute. In that case the suit was filed in 1943 for eviction of the tenant. On 11th July, 1944, clause 8 of the Madras Non-Residential Buildings Rent Control Order, 1942, was amended and when so amended the clause ran as follows :—

"A tenant in possession of a non-residential building shall not be evicted therefrom, whether in execution of a decree or otherwise. . . . except in accordance with the provisions of this clause."

It was contended before the Division Bench that the moment a person files a suit he obtains thereby a vested right to have applied not only to the suit, but to all execution proceedings also, the law relating to execution as it existed at the time of filing the suit. The learned Judges had no difficulty in rejecting this contention as they were not aware of any such principle. They found no reason to think that if a new law is introduced restricting the right to execute, execution proceedings can nevertheless be instituted if such a right existed on the date of the filing of the suit. The observations of Sulaiman, J., in *The United Provinces* v. *Mt. Atica Begaun*[2], were relied on behafore the Division Bench but the learned Judges did not agree that the observations in any way affected their decision. Actually in that case the decree was passed after clause 8 of the Non-Residential Buildings Rent Control Order had been amended in the manner aforesaid. The execution petition was filed subsequently. The decision of the learned Judge was that clause 8 prohibited the decree-holder from filing an execution petition, his only way of evicting the tenant being to file an application before the Rent Controller. No doubt there is a reference to pending proceedings in one part of the judgment but it was not necessary to deal with the point because they held that during the interval between the passing of the decree and the filing of the execution petition there was no pending proceeding. The basis of the decision is certainly against the view that clause 8 would not affect pending proceedings. Mr. Narayanaswami Ayyar relied upon the decision of Mockett, J., in *Moothaliandan Chetti* v. *Venkatesam Chetti*[3]. In that case the Chief Judge of the Court of Small Causes dismissed an application for ejectment. That application was filed on 18th March, 1944. There was a sub-letting of a portion in June, 1943. Possession was to be given on 14th April. On 14th April the plaintiff when he sought to obtain possession was obstructed by the respondent. Thereupon an application was made, to the Small Cause Court and that Court dismissed the application. The learned Judge adverted to the difference in the language between the old section 7-A, Madras House Rent Control Order and the new section 7-A. The learned Judge took the view that the Small Cause Court had no jurisdiction to invoke the new provision and construe it to operate retrospectively. He allowed therefore the reveision petition before him and set aside the order of the Small Cause Court. In the concluding portion of his judgment there are certain observations which really are pertinent for the disposal of this case, namely :

"If and when an application for possession comes before the Controller, the Controller should apply his mind to the circumstances actually and presently before him to enable him to make or refuse an order, and it would be for one side or the other to point out that the application for ejectment had lost its force owing to the fact that since the application has been made, difficulties which were then not in existence had arisen or difficulties that were in existence had disappeared."

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1. (1949) 1 M.L.J. 376 : A.I.R. 1949 Mad. 809.
2. (1941) 1 M.L.J. Sup. F.C. 65.
3. (1945) 1 M.L.J. 441.

We must confess we are not able to fully appreciate the scope of these observations. The Division Bench in *Md. Sukri Sahib* v. *Madhava Kurup*[1], understood this passage thus :

"It is seen from this passage that the learned Judge, far from thinking that the landlord had, by the institution of his application for possession in the Sub-Court, acquired an absolute right to physical possession, contemplated proceedings before the rent controller in which it would be contended by the tenant that in view of the new legislation, actual possession could not be given ".

In *Muhammadunny* v. *Melapurakkal Unniri*[2], it was pointed out by a Division Bench to which one of us was party that the jurisdiction of a Civil Court to entertain and pass a decree in a suit for eviction by a landlord against his tenant is not expressly or impliedly taken away and that clause 8 of the Madras Non-residential Buildings Rent Control Order, which corresponds to section 7 of the Madras Buildings (Lease and Rent Control) Act, 1949, prevents the tenant from being thrown out. One of the methods of eviction is by the process of execution of a decree for possession and it was held that this method was prohibited and eviction could only be in accordance with the provisions of the Rent Control Order.

In our opinion this appeal can be disposed of on a very short point. This appeal arises out of an execution petition filed on 12th July, 1954, (E.P. 240 of 1954) by the legal representative of Marudappa Chettiar. There was no doubt a prior execution petition filed by Marudappa Chettiar himself and an order for eviction but admittedly the respondent had not been evicted in pursuance of that order. That is why after the death of Marudappa Chettiar his legal representative, the appellant before us, was compelled to file another execution petition praying for delivery of possession. That admittedly was filed after the Rent Control Act had come into operation in the village in which the property was situated. We fail to see how the principle against retrospective operation is offended in this case. It is not as if during the pendency of E.P. No. 240 of 1954, out of which this appeal arises, that the Rent Control Act came to be extended to the suit village. By the date of the filing of the present execution petition the Act had come into force. The executing Court which was bound to apply the provisions in the statute had come into force even before the date of the execution petition which it was called upon to dispose of. In our opinion there is no substance in the contention of learned counsel for the appellant.

It was argued but without the support of any authority that section 7 would not apply to compromise decrees. Once a decree is passed, we can see no difference on principle between a decree passed on a compromise and a decree passed after contest.

Mr. Narayanaswami Ayyar sought to raise a new point which was not raised by him in the Courts below and not even in the memorandum of appeal, namely, that as the respondent had obtained a stay of the order for delivery passed by the learned District Munsif of Tiruchirapalli on 15th April, 1954, on the misrepresentation that the Rent Control Act had been extended to the suit village, he was disentitled to any relief based on the provisions of the Act. We do not have the order of stay passed by the learned District Judge nor a copy of the affidavit filed by the respondent in support of his application. We do not know what prompted the learned District Judge to pass the *ex parte* order. In the absence of even a specific ground in the Letters Patent Appeal, we do not think the appellant should be allowed to raise a new point at this late stage. The appeal fails and is dismissed with costs.

R.M. *Appeal dismissed.*

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1. (1949) 1 M.L.J. 376 : A.I.R. 1949 Mad. 809. 2. (1949) 1 M.L.J. 452.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Karuppa Goundan .. *Appellant**

v.

Periaswami Goundan and others .. *Respondents.*

Hindu Law—Alienation—Deaf mute incapable of understanding and safeguarding his own interest and found as such by Court and guardian-ad-litem *appointed—Alienation by mother and wife as* de facto *guardias for necessity—Validity—" Lunatic "—Meaning of—Lunacy Act (IV of* 1912), *section* 3 (5).

A *de facto* manager of the estate of an adult Hindu who is incapable of contracting because of unsoundness of mind cannot alienate his property even in case of necessity.

Where an adult Hindu was, after inquiry in proceedings in Court, found to be a person of unsound mind and a guardian-*ad-litem* was appointed to represent him, an alienation of his property by his mother and wife as his *de facto* guardians cannot be upheld on the ground of necessity, but has to be held to be void and would confer no title on the alienee or his representatives or successors. The proper procedure is for the mother and wife to get themselves appointed as guardians by Court on a proper application in that behalf and obtain the permission of the Court to alienate the property. A man who is born deaf and dumb has to be regarded as being in the same state as idiot because, being dumb and incapable of understanding, he is lacking in all those senses which furnish the human mind with ideas. In other words he would be a lunatic as defined by section 3 (5) of the Lunacy Act, and the term would include one who is so found by a competent Court on proper evidence.

Kanhai Lal v. *Har Singh*, I.L.R. (1944) Nag. 698, followed.

Narayan v. *Ramachandra*, A.I.R. 1957 Bom. 146 and *Nageswar Prosad Singh* v. *Rudra Prokash Singh*, (1903) I.L.R. 31 Cal. 210, relied on.

Pundarikakshayya's case, (1949) F.L.J. 288 : A.I.R. 1949 F.C. 218 and *Palani Goundan* v. *Vanjiakkal*, (1956) 1 M.L.J. 498 : I.L.R. (1956) Mad. 1062, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Erode, in A.S. No. 9 of 1956 (Original Suit No. 586 of 1950, District Munsif's Court, Erode).

R. Gopalaswami Iyengar, for Appellant.

M. Natesan and *N. Sivamani*, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal is directed against the decree and judgment of the learned Subordinate Judge of Erode in A.S. No. 9 of 1956 confirming the decree and judgment of the learned District Munsiff of Erode in O.S. No. 586 of 1950.

In Servarayapalam Village, Erode Taluk, Coinbatore district, there is one Oomai Malaya Goundan. He, as his name itself shows, is a deaf-mute. He is also found to be lame and is described as an idiot. It has been found by the learned District Munsif that he was not in a position to form a rational judgment and capable of safeguarding his own interest. Therefore, after an elaborate enquiry in I.A. No. 1685 of 1952, the learned District Munsif of Erode came to the conclusion that Oomai Malaya Goundan was not in a position to understand his own interest or act independently and therefore appointed a guardian-*ad-litem*. This was the subject-matter of a revision petition in this Court and I upheld the order of the learned District Munsif of Erode. That decision is reported in In re *Periaswami Goundan*[1]. In other words, this Oomai Malaya Goundan has been found to be a person of unsound mind and has got to be represented by a guardian-*ad-litem*.

Oomai Malaya Goundan's mother is Angammal and his wife is Najakkal. It is stated that he has also a daughter by that wife.

In these circumstances these three persons purport to have executed a sale deed in favour of the plaintiff under Exhibit A-4 on 2nd September, 1930. Earlier they had executed a usufructuary mortgage in favour of the first defendant under Exhibit A-3, dated 20th June, 1930. The purchaser has been undertaking to redeem this usufructuary mortgage.

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* S.A. No. 563 of 1957. 10th July, 1959.
(19th Asadha, 1881—Saka.)

1. A.I.R. 1954 Mad. 810.

In these circumstances Karuppa Goundan, the plaintiff, who has taken an assignment of the sale-deed from his father-in-law, the vendee of these three persons, has filed this suit for redemption of the usufructuary mortgage.

The usufructuary mortgagee put forward the contention that this Karuppa Goundan has no title to redeem because the sale transaction is void, inasmuch as the wife and the mother cannot act as guardians of this person of unsound mind to alienanate the property, and much more so Oomai Malaya Goundan who is incapable of contracting cannot pass a good title to the father-in-law of the plaintiff.

It was the contention of the learned advocate Mr. Gopalaswami Ayyangar, that the mother and the wife constitute *de facto* guardians of this man and that this alienation was for necessity and therefore it is binding on the 1st defendant. In support of this contention he relied upon my decision in *Palani Goundan* v. *Vanjiakkal*[1], following the Federal Court's decision in *Pundarikakshayya's case*[2], and other subsequent decisions following that case.

On the other hand, the learned advocate for the respondents, Mr. Natesan, pointed out that once we come to the conclusion that this deaf-mute Oomai Malaya Goundan is an idiot and his property cannot be alienated even for necessity by the *de facto* guardians, he urges that the proper procedure was for the mother or wife or both to get themselves appointed as guardians by Court on a proper application in that behalf and take the permission of the Court to alienate the property.

There can be no doubt that the position taken by Mr. Natesan is fully supported by authority. In *Kanhaiyalal* v. *Harsingh*[3] it has been held that a *de facto* manager of an estate of an adult Hindu who is incapable of contracting because of unsoundness of mind cannot alienate his property even in case of necessity.

In regard to the unsoundness of mind the following information can be gathered from Ballantyne's Law Dictionary ; Common Law regarded a man who was born deaf, dumb and blind as being in the same state as an idiot because being dumb and incapable of understanding he was supposed to be lacking in all those senses which furnish the human mind with ideas. Idiot has been defined to be a person who from his nativity by reason of perpetual infirmity is *non compos mentis* ; that is, entirely destitute or bereft of memory and understanding. This will take in the term 'lunacy' also which is that condition or habit of mind in which it is directed by the will, but is wholly or impartially misguided or erroneously governed ; or it is an impairment of one or more of the mental faculties, accompanied by or inducing a defect in the power of comparison.

I have already metioned the circumstances under which the guardian *ad litem* came to be appointed. Therefore, the learned advocate says that this case would come within the ambit of the *Nagpur decision*[3] and, especially when the Indian Lunacy Act itself defines in section 3 (5) a lunatic as meaning an idiot or persons of unsound mind. In *Nageswar Prosad Singh* v. *Rudra Prokash Singh*[4], the term lunatic was held to include one who is so found by a competent Court on proper evidence. It appears to me, therefore, that this is a case falling within the ambit of *Kanhai Lal* v. *Harsingh*[3].

This decision has been followed in a Full Bench decision by the Bombay High Court in *Narayan* v. *Ramachandra*[5]. The Bombay High Court pointed out that the established law on the point laid down by the Federal Court in *Sriramalu* v. *Pundarikakshayya*[2], does not apply to the case of a Hindu adult who is under a disability and the alienation is by his *de facto* guardian or manager. It was argued in the Bombay High Court that there was no distinction in principle between the case of a minor and an adult under a disability. But the Full Bench repelled this contention and came to the conclusion that the *de facto* manager of the estate of an adult Hindu who is

1. (1956) 1 M.L.J. 498 : I.L.R. (1956) Mad. 1062 : 69 L.W. 276.
2. (1949) F.L.J. 288 and 318 : (1949) F.C.R. 65 : (1950) 1 M.L.J. 586 and 612 : A.I.R. 1949 F.C. 218 (F.C.).
3. I.L.R. (1944) Nag. 698.
4. (1903) I.L.R. 31 Cal. 210.
5. A.I.R. 1957 Bom. 146.

incapable of contracting because of unsoundness of mind cannot alienate the property even in case of necessity.

Therefore the alienation made by the mother and the wife has got to be held as void and as conferring no title on the plaintiff or his predecessor-in-title.

The learned advocate Mr. Gopalaswami Ayyangar raised two interesting arguments which, however, are not germane to the controversy before us. First of all he argues that a congenital deaf-mute idiot is excluded from inheritance and therefore his mother becomes the owner of the property, the excluded person being entitled only to maintenance though not tainting the blood of any son who might be born to him. But the case here is not that the property belonged to the mother and therefore she alienated the property and it was not open to anybody to question that transaction. On the other hand, the mother purports to have dealt with the property as the guardian of her son and in this she is joined by the wife of the idiot. The addition of this Oomayan makes no difference because when he is incapable of contracting and his inclusion in the document was a mere waste of paper and adds no more legal basis for the validity of the transaction.

The second argument of the learned counsel is that Mr. Natesan's client, namely, the usufructuary mortgagee, is also in the same boat. But two blacks will not make one white. In this case all we have got to decide is whether the plaintiff can redeem the property and once it is found that he has no title to redeem having no valid title, the other questions become otiose.

The net result of this analysis is that this Second Appeal has got to be dismissed and is hereby dismissed and in the circumstances without costs throughout. No leave.

P.R.N. *Appeal dismissed: Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

V. Janakamma .. *Petitioner**

v.

V. G. Rangaraj .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7-A (4) and Rule 9 of the Rules and section 12—Power of remand by appellate authority—Scope and extent of.

An order passed under section 7-A (4) of the Madras Buildings (Lease and Rent Control) Act could not be deemed an *ex parte* order within the scope of rule 9 of the Rules, where the tenant was represented by counsel and the arrears of rent were not paid. In the absence of an appeal against such an order, it is not open to the tenant to file an application to set aside the order on the footing that it was made *ex parte*. The mere fact that an appeal was filed against the order refusing to set aside the alleged *ex parte* order and the appellate Court remanded the matter to the Controller cannot give it any greater validity in law. In such cases acceptance of cost by the other side awarded by the order of remand cannot make the order valid. An order of eviction passed under section 7-A (4) of the Act is the result of failure to pay the rent before the hearing and such an order has nothing to do with the original default complained of in the main application by the landlord. In an appeal against an order made under section 7-A (4) of the Act the appellate authority cannot call for a finding whether the default on which the original petition was based was wilful or not. An order of remand by the appellate authority on a point not arising before the Rent Controller is incompetent.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Chief Judge, Court of Small Causes, Madras, dated 26th April, 1958 and made in H.R.A. No. 78 of 1957 (I.A. No. 1120 of 1956) in H.R.C. No. 4376 of 1956, Court of the Rent Controller, Madras.

T. Venkatadri and *K. Natarajan*, for Petitioner.

M. R. Vijayarangam, for Respondent.

*C.R.P. No. 2668 of 1958. 21st August, 1959. (30th Sravana, 1881-Saka.)

The Court delivered the following

JUDGMENT.—This Civil Revision is directed against the appellate order of the Court of Small Causes at Madras in H.R.A. No. 78 of 1957. That appeal was preferred against I.A. No. 1120 of 1956 in H.R.C. No. 4376 of 1956. The petitioner before me, the landlady of the premises, occupied by the respondent before me, as a tenant, applied to the Rent Controller for eviction on the ground of arrears in payment of rent. After counter-statement was filed in the procedings the Rent Controller acting under the Proviso to section 7, clause (2) of Madras Buildings (Lease and Rent Control) Act, 1949, directed the tenant to pay all arrears of rent up to date. After this order had been made the proceeding came on for hearing on 31st December, 1956. That day the following order was passed by the Rent Controller:

"Parties by counsel. Arrears not paid as directed. Respondent is absent when called thrice. Proceedings are stopped and eviction is ordered under section 7-A (4) of the Madras Rent Control Act."

Thereafter the tenant filed I.A. No. 1120 of 1956 to set aside the order of eviction passed on 31st December, 1956. This I.A. was disposed of by the following order passed by the Rent Controller on 7th January, 1957 :—

"The applicant was represented by his counsel and the order of eviction was passed under section 7-A (4) of the Madras Rent Control Act. Hence this application is rejected as not maintainable."

Against this order an appeal was preferred under section 12 of the Act which came on for hearing before the Second Judge of the Court of Small Causes, Madras, on 24th April, 1957. That day the following order was passed:

"Rs. 10 paid today and accepted. The matter will be sent to R.C. for a finding as to whether the default was wilful. Parties to appear before R.C. 8th May, 1957. Finding by 4th July, 1957".

The tenant failed to appear before the Rent Controller in the remanded proceeding and he thereupon submitted a finding on 12th June, 1957, to the effect that the default in payment of rent was wilful. When the appeal was taken up after the submission of the finding the tenant was absent and the appeal was dismissed. Two successive applications to restore the appeal to file made by the tenant were also dismissed for default of his appearance. Ultimately the Chief Judge of the Court of Small Causes called for a fresh finding from the Rent Controller. The Rent Controller then submitted a finding that the default in payment to rent was not wilful and accepting this finding the Chief Judge of the Court of Small Cause allowed the appeal and set aside the order of eviction.

Two points are raised by the learned counsel for the petitioner. The first is that the appeal to the Small Causes Court is itself incompetent as it was directed against the order in I.A. No. 1120 of 1956 and not the order of the Rent Controller directing eviction of the tenant. It may be remembered that I.A. No. 1120 of 1956 was an application to set aside the alleged *ex parte* order of eviction passed by the Rent Controller though his counsel was present when that order was passed. In the absence of an appeal against the substantive order, the contention urged is, that the appellate Court had power only to allow I.A. No. 1120 of 1956 which would result in reopening of the original order. The point made by Mr. Venkatadri for the petitioner is that the original order was not passed *ex parte* and, therefore I.A. No. 1120 of 1956 was itself incompetent.

The next point made by him is that in the appeal against the order passed in I.A. No. 1120 of 1956 the appellate Court had no jurisdiction to call for a finding whether the default in payment of rent, on which the application for eviction was based, was wilful. His contention is that, that was not the basis for eviction passed by the Rent Controller under section 7-A (4) of the Act. It will be seen that section 7-A (4) of the Rent Control Act deals with payment of arrears as a condition precedent to, the hearing of the tenant on the objection raised by him. The Act empowers the Rent Controller in a case in which eviction is sought on the ground of default in payment of rent to give an opportunity to the tenant to pay off all the arrears up to date. Non-compliance of this order results in a termination of the proceeding and

making an order directing the tenant to put the landlord in possession of the building. This has nothing to do with the original default on which the application for eviction is based. The finding called for by the appellate Court in this case related to the original default which was not the basis on which the order was passed under section 7-A (4).

The conduct of the tenant in this case after the proceeding for eviction was instituted clearly shows that he was grossly negligent in the conduct of his defence. Innumerable opportunities were given to him both by the Appellate Court and by the Rent Controller. On none of these occasions he turned up except on the last occasion when he appeared before the appellate Court when a fresh finding was called for and also before the Rent Controller who submitted a revised finding. There can be no doubt that the tenant has been grossly negligent. But the discretion exercised by the appellate Court to excuse all this dilatoriness on the part of the tenant is not attacked before me. As already observed the points taken are that the appeal itself was incompetent and in such an appeal a finding could not have been called for as regards the original default in payment of rent. An order of remand on a point not arising before the Rent Controller is patently incompetent. The same view was taken by Ramaswami, J., in *Narayanaswami Reddiar* v. *Dhanraj Sowcar*[1]. If an order of remand was made without jurisdiction the mere acceptance of the costs awarded, Rs. 10, by the landlord could not have the effect of curing the defect in the order. It will be seen that the Second Judge of the Court of Small Causes in the first instance directed a remand of the case and called for a finding on the question whether the default to pay rent was wilful and as a condition of the order called upon the tenant to pay costs Rs. 10 to the landlord and this sum was paid and accepted. Counsel for the respondent contended that the acceptance of this costs by the landlord was sufficient to prevent him from questioning the competency of the Court which passed that order. If the Court had no jurisdiction to pass the order the mere acceptance of that order by one party will not prevent him from questioning the validity of that order. Authority for this is found in *Narayanaswami Ayyar* v. *SubramaniaPillai*[2], with which I am in respectful agreement. The result is the order for eviction passed by the Rent Controller on 31st December, 1956, had become final, no appeal against that order having been preferred in time. That order was not passed in the absence of the tenant because his counsel was present. I.A. No. 1120 of 1956 was, therefore, incompetent as it proceeded on the footing that the order for eviction was an *ex parte* order. The appeal against that I.A. was equally incompetent and the appellate Court had no jurisdiction to direct a remand or call for a finding in such appeal. The order of the Chief Judge of the Court of Small Causes is, therefore, set aside and the order of the Rent Controller, dated 31st December, 1956, is restored. No costs in the Revision. The tenant is given three months' time from today for vacating the premises.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The Collector of Tiruchirapalli .. *Appellant**

v.

Velan Chettiar, son of Muthukaruppan Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Suit under—No proof of breach of trust or of misappropriation or malversation—Persons in management—If liable to account for the period of management.

In a suit under section 92 of the Civil Procedure Code where there has been no diversion of funds as to be termed a misappropriation or malversation of the trust funds or even a breach of trust the

1. (1958) 1 M.L.J. 77.
2. (1935) 69 M.L.J. 673 : A.I.R. 1936 Mad. 49.

* S.A. No. 491 of 1955. 28th July, 1959. (6th Sravana, 1881-Saka).

persons who were in management of the trust properties should not be asked to account for the period of their management.

A mere spending for other religious or charitable purposes cannot always amount to a diversion of the trust funds.

Appeal against the Decree of the Court of the Subordinate Judge of Pudukottai, in O.S. No. 25 of 1952.

The Government Pleader (*K. Veeraswami*), for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This appeal arises out of a suit filed under section 92, Civil Procedure Code and relates to the period for which the trustees, who have been removed by the decree of the lower Court, have to account? The Collector of Tiruchirapalli, who was the plaintiff in the suit, is the appellant.

The respondents, who number about 31, are the descendants of one V.M. Muthukaruppan Chettiar. Muthukaruppan Chettiar founded several charities, one of which was an Annadanam charity at Tirumayam in Tiruchirapalli District. The appellant claimed that the properties set out in Schedules A to D to the plaint belonged to the Anandanam trust established by V.M. Muthukaruppan Chettiar, that the respondents asserted a hostile title to the trust and that they were guilty of breaches of trust, and prayed for their removal and for accounts.

Schedule A to the plaint is the chatram in which Annadanam is to be performed. B Schedule covered lands in Olakkudipatti village. C Schedule item 1 is $31\frac{9}{12}$ shares out of 37 shares in the village of Mangalanadu, which is of an extent of about 360 velis. The second item of C Schedule is certain lands in Arasarkulam village. D Schedule covered the movables belonging to the choultry.

There were six branches in the family of Muthukaruppan Chettiar and the seniormost member of the various branches managed the trust by turns. Respondents 1, 7, 15, the father of respondent 17, respondents 19 and 22 were the managing members of the various branches, who were at some time or other in management of one or more of the properties mentioned above.

The respondents contested the suit. Respondents 3, 15, 18, 19 and 25 filed a common written statement while the 15th respondent filed a separate written statement. The substance of the contentions so far as it is relevant for the present purpose is that the former set of respondents pleaded that items 1 and 4 of B Schedule and item 1 of C Schedule belonged to the family and the income therefrom was exclusively allotted to certain religious and charitable purposes at the discretion of the members. They, however, admitted that A Schedule, items 2, 3 and 5 of B Schedule, item 2 of C Schedule and D Schedule belonged to the Annadanam trust.

The 14th respondent contested the claim but admitted that all the properties excepting C Schedule, item 1 belonged to the trust, and while the property was owned by the members of the family as their own the income was expended for the maintenance of the charities and the religious trust. All the respondents denied the alleged malversation of the funds of the institution.

The learned Subordinate Judge, after giving the necessary findings, held that A, B, C, and D Schedule properties belonged to the V. M. Annadanam Chatram Charity at Tirumayam, and having regard to the hostile title set up by the respondents to the properties of the institution removed them from the office of the trusteeship and directed the properties to vest in the trustees to be appointed under the scheme to be framed by the Court. He also directed that the 22nd respondent should render accounts of his management from 12th January, 1946 to 6th May, 1947, and that the 17th respondent should produce the account books of his father in respect of his management of item 2 of the S Schedule properties for the same period. The learned Subordinate Judge held that the 22nd respondent should be accountable in respect

of A Schedule properties, items 1 to 7 of the B Schedule properties, item 1 of the C Schedule property and items 1 to 154 of the D Schedule properties. As regards the 17th respondent he was directed to produce the accounts of his father's management of the 2nd item in S Schedule property. As regards the accounting, the learned Subordinate Judge held that there has been no misappropriation of the funds of the charity by the members of the family, and that in the circumstances of the case Article 120 of the Limitation Act would apply to the claim, and as a receiver was in charge of the properties from 6th May, 1947, the accounting parties were liable to render account for the period which commenced six years before the date of suit and terminated with the date when the receiver took possession of the properties.

The respondents have not challenged the decision of the lower Court. The plaintiff, however, has filed an appeal in regard to the disallowance of the account for the period anterior to 12th January, 1946.

The learned Government Pleader, who appeared for the plaintiff-appellant, contended before us that section 10 of the Limitation Act would apply to the present case and not Article 120 of the Limitation Act. So far as we are able to see from the records it is difficult to ascertain precisely what exactly was the nature of the accounts that was demanded of the respondents. We are unable to ascertain whether the accounting that was required of the respondents was an accounting for the mere ascertainment of the assets existing on the date when the Receiver took possession or one for wilful default or for misapplication of funds by the respective parties. The learned Government Pleader, however, made it clear before us that the accounting that is required of the respondents was of the latter category, that is for the alleged diversion of funds by the respective trustees in possession of the various items of properties.

In *V. K. Kelu* v. *G. S. Sivarama Pattar*[1], it was held that it is a general principle that back accounting would not be decreed except on proof of dishonesty and malversation. The decision in that case was rendered in a suit under section 92 of the Civil Procedure Code. That section provides for giving directions for accounting in a case where there has been an alleged breach of trust. Therefore, the question to be considered is whether the appellant has made out a breach of trust, dishonesty or malversation of the trust funds.

It is not the appellant's case that any of the respondents applied the income from the properties to any personal purpose of his own. The only case urged before us is that there was a misapplication of the funds by the respondents, who were in charge of the properties, having spent the money for other charitable purposes and for celebrating fastivals in certain temples. So far as the conduct of the Annadanam Charity is concerned the learned Subordinate Judge has accepted the evidence of D.W. 5, who spoke to the fact that Annadanam was regularly conducted in the chatram, till the Receiver came into possession of the properties. There is no evidence on the side of the plaintiff to show that there was any misappropriation or malversation of the trust funds. The 22nd respondent, who is the main accounting party, had been maintaining regular accounts and he had also filed the same in the lower Court, Exhibits B-4 to B-18. No attempt was made either in the lower Court or here, to find out from the account books any misappropriation by the trustees or any breach of trust. D.W. 1, who is the 15th defendant, stated in his cross-examination that dring the past 10 years the income from the Mangalanad lands, that is C Schedule, item 1 was used not only for running the chatram but also for conducting the temple. The learned Government Pleader placed great reliance on the so-called admission of the 22nd respondent giving evidence as D.W. 4 when he stated that the Mangalanad income had been never used for the chatram so long as he was in management of that property. That witness, however, stated that he did not know what the other branches did with the income from the Mangalanad. He, however, clarified this evidence in his cross-examination when he stated that he had never utilised the Mangalanad

1. A.I.R. 1928 Mad. 879.

income for his personal purposes. As early as 1940 and 1945 he had stated that Mangalanad property was not partible property but one the income from which had to be utilised for the chatram, temple and other charities. There is no satisfactory evidence in this case as to the terms on which the original dedication was made. So far as the Mangalanad properties are concerned we find a mention of these properties in the extracts from the Inam Register, Exhibit A-1. An enquiry was made in regard to these properties by the Inam Commission. Although it was a private endowment, the properties were purchased from certain inamdars holding a battavrithi inam, which was granted by the ancient rulers. Exhibit A-1 refers to a statement by Muthukaruppan Chettiar in which he stated that the properties had been left for the Annadanam Chatram built by him at Tirumayam, and that Annadanam charities were being done. Exhibit A-2 is the extract from the Huzur Register kept by the Collector of Tanjore. It is of the year 1862. Exhibit A-2 is a record of the inam proceedings contemporaneous to Exhibit A-1. That refers to a statement of Muthukaruppan Chetty that the proceeds from the Mangalanad lands had been appropriated towards the support of a choultry erected by him at Tirumayam. The other evidence discloses that for a long number of years the family had been utilising the income from the properties not merely for the expenses of the Chatram but also for festivals in the temple and for other charitable purposes. No attempt has been made before us to show from the account-books filed in the case or otherwise the extent of the charities so done in relation to the total income from all the properties dedicated to the trust. It is no doubt made out from the evidence of D.W. 4 that some portion of the income from the properties had been utilised by the members of the family for a long number of years in the performance of certain other charities and festivals in a temple. A mere spending for other religious or charitable purposes cannot always amount to a diversion of the trust funds. It may be that these charities or the performance of the religious services involved the distribution of food to the poor. It is not uncommon that in certain Annadanam choultries expenses are incurred in connection with the performance of festivals in temples. These acts cannot by themselves amount to a diversion of funds and there is no evidence to show what was the amount so spent in relation to the amount spent for the main trust, *viz.*, Anandanam trust. In the present case, the appellant has failed to show that there has been such a diversion of funds as to be termed a misappropriation or malversation of the trust funds or even a breach of trust. We are of opinion that under the circumstances the appellant will not be entitled to call upon any of the respondents to account for the period of his management of the properties. The appeal fails and is dismissed, which means the decree of the lower Court is confirmed.

It is unfortunate that the respondents were not represented at the hering of the appeal.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Shankerlal .. *Petitioner**

v.

Collector of Central Excise, Madras and another .. *Respondents.*

Constitution of India (1950), *Article* 20 (3)—*Scope of—Protection under—Person summoned to appear under Sea Customs Act—If a person accused—If entitled to protection under Article* 20 (3).

Evidence Act (*I of* 1872), *section* 132—*Applicability.*

Sea Customs Act (*VIII of* 1878), *section* 171-A—*Duty of person summoned to appear before the authorities and answer all questions—Nature of proceedings under.*

The scope of protection which a witness enjoys against self-incrimination is not quite the same under Article 20 (3) of the Constitution of India as under the American Constitution. Article 20 (3)

* W.P. Nos. 840 and 849 of 1958. 7th September, 1959. (16th Bhadra, 1881—Saka.)

is available only in relation to a proceeding in a criminal Court and therefore the field of protection in India is narrower than in the United States of America. A person summoned to appear before the Sea Customs Authorities under section 171-A of the Sea Customs Act, 1878, is not in the position of a person accused and he is bound to appear before such authorities and answer all questions put to him. Section 132 of the Evidence Act would apply only to judicial proceedings in or before any Court. As proceedings before the Sea Customs Officers are not judicial proceedings nor do such Officers constitute Courts, the section has no application to such cases.

The position in such proceedings in relation to Article 20 (3) of the Constitution and the Sea Customs Act will be as follows: (1) When the departmental Officers conduct proceedings which may terminate in the confiscation of goods or the imposition of penalties which they can themselves impose, without reference to any criminal Court, such Officers are not acting as Courts of law and the proceedings before them are not judicial proceedings, except for the limited purposes of sections 193 and 228, Indian Penal Code ; (2) To the persons examined in such proceedings section 132 of the Evidence Act would not apply of its own force ; (3) But as they are empowered to prosecute persons for contravention of the Sea Customs Act the position of Customs Officers will in certain respects be analogous to that of Police Officers acting on information relating to a cognizable offence ; (4) A person who has been examined by the Customs Officers will not be in the position of an accused till it can be fairly and properly said that he is likely to be proceeded against in a criminal Court ; (5) Though the question when a person becomes an accused person would depend on the decision that the departmental Officers may take, they cannot, by merely pretending that they have not made up their minds, circumvent the provisions of Article 20 (3) ; (6) Whether a witness or a suspect has become an accused person in any particular instance is substantially a question of fact.

Per *Curiam*.—"It is very desirable that the departmental Officers should make it plain to the person concerned at the earliest moment they can do so, whether it is intended to proceed against him in a criminal Court or not. If it is made plain that there is no intention to proceed against him in a criminal Court then no question of invoking the shield of Article 20 (3) could possibly arise, and the person will be bound to answer all the questions put to him and, those answers can be taken into account only for imposing departmental penalties. But, if it is intended to prosecute the person concerned in a criminal Court he cannot be compelled to answer any question the answer to which is likely to incriminate him. If, nevertheless, he is forced to answer such questions the answer so obtained cannot be used in evidence against him at the trial".

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to the proceedings, dated 10th October, 1958, issued by the Collector of Central Excise, Madras, under section 171-A of the Sea Customs Act in relation to the show-cause notice bearing reference O.R. No. 24/58-59, dated 29th September, 1958 and quash the above proceedings, dated 10th October, 1958.

S. K. L. Ratan, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and *M. M. Ismail*, for Respondents.

The Court made the following

ORDER.—The questions that arise for determination in both these petitions are the same and I shall, therefore, deal with them together.

On 23rd September, 1958, the Collector of Central Excise, Madras, seized 500 packets of 7 O'Clock blades from No. 47, Narayana Mudali Street, George Town. Each packet contained 100 blades so that in all the total number of blades seized was 50,000. On 29th September, 1958, the Collector of Central Excise sent a notice to Shankerlal, the petitioner in Writ Petition No. 840 of 1958, which runs as follows :

"Whereas there is reason to believe that the goods mentioned in the schedule below have been imported without payment of customs duty and import trade control licence in contravention of section 19 of the Sea Customs Act read with section 3 (2) of the Imports and Exports Control Act, 1947 and you are liable to a penalty under section 167 (8) of the Sea Customs Act.

2. You are, therefore, called upon to show cause before the undersigned at Madras within ten days from the date hereof why a penalty should not be imposed upon you and why the said goods should not be confiscated under the aforesaid provisions of law.

3. All evidence documentary or otherwise in your possession be produced in support of your explanation within the period specified above failing which the case will be decided *ex parte*.

4. You should state at the same time whether you desire to be heard in person or through your legal representative in your defence by the said authority on receipt of your reply, if necessary, at time and date which will be fixed and communicated to you.

SCHEDULE.

7 O'clock blades (Made in England)—50,000 numbers".

On 3rd October, 1958, counsel for the petitioner wrote to the Collector of Central Excise stating that the goods had been seized far away from the border and in circumstances which could not raise any presumption against him. He further mentioned that the onus was not on the petitioner to prove that the goods had been imported without payment of duty. He also called upon the Collector of Central Excise to state the grounds of seizure because, according to him, he was entitled to that information under section 181 of the Sea Customs Act.

On 6th October, 1958, the Collector of Central Excise replied that the goods had been seized under the reasonable belief that the blades had been smuggled from the foreign territory without payment of duty. On 9th October, 1958, counsel for the petitioner replied that the letter of the Collector did not satisfy the requirements of section 181 of the Sea Customs Act. On 10th October, 1958, the Collector of Central Excise issued a summons under section 171-A of the Sea Customs Act to the petitioner which runs as follows:—

> " Whereas there are grounds for investigations being made in connection with the seizure of 7 O'clock blades numbering 50,000,
>
> And whereas I consider your attendance before me necessary for producing documents of the following description in your possession or power. Documentary evidence and your account books for the receipt of the goods, *viz.*, 7 O'clock blades if any may also be produced.
>
> Now, therefore, in exercise of the powers vested in me by section 171-A of the Sea Customs Act, 1878, I do hereby summon you to appear before me in the office of the Collector of Central Excise, No. 15, Harrington Road, Madras-31, on 15th October, 1958, at 10 A.M., for the purposes herein mentioned. You are warned that giving false evidence in the proceedings is an offence punishable under section 193 of the said Code."

The case of the petitioner is that the Collector has no right whatever to summon him under section 171-A of the Sea Customs Act and he has therefore come to this Court for the issue of an appropriate writ to quash these proceedings of the Collector.

The facts in Writ Petition No. 849 of 1958 are similar. A quantity of 136,400 7 O'clock blades was seized from No. 20, Narayana Mudali Street. The petitioner herein also wrote through counsel asking the Collector to state the grounds on which the goods had been seized. On 1st October, 1958, the Collector issued a notice to the petitioner in terms similar to that in Writ Petition No. 840 of 1958. He also issued summons under section 171-A of the Sea Customs Act to the petitioner herein and the terms of the summons are in all material respects the same as in the earlier case. The relief which this petitioner seeks is also the same as in the earlier writ petition.

The principal contention taken on behalf of the petitioners—in the final form which is assumed during the arguments—was this. Article 20 (3) of the Constitution provides that " no person accused of any offence shall be compelled to be a witness against himself ". Neither the word "accused" nor the word "offence" is defined in the Constitution. However Article 367 makes the General Clauses Act, 1897, applicable to the interpretation of the Constitution and so we are entitled to look into that Act to find out in what sense the words "accused" and "offence" are used in the Constitution. In the General Clauses Act of 1897 the word 'accused' is not defined. But, there is a definition of the word " offence " which runs as follows:

> " Offence " shall mean any act or omission made punishable by any law for the time being in force ".

This definition is wide enough to include punishments imposed by any authority properly constituted by the law. These authorities may be Excise Officers, Customs Officers, Income-tax Officers, or in fact, anybody else. Officers of the Customs Department have been specifically empowered by the Sea Customs Act to impose various penalties, including fines and confiscation of goods. The acts or omissions

in respect of which they have been empowered to impose these penalties are therefore "offences". Section 167 of the Sea Customs Act opens with these words:

"The offences mentioned in the first column of the following Schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offence respectively".

Since the statute itself calls the acts or omissions referred to therein offences, since they are made "punishable" and since the Customs Officers allege that the petitioners have contravened the provisions of the Sea Customs Act, the petitioners are accused persons within the meaning of Article 20 (3) of the Constitution and they cannot be compelled to give evidence which may render them liable to any of the penalties laid down in the Sea Customs Act.

This apart, the allegat.ons made against the petitioners in relation to the blades set out in the notices issued to them amount to an accusation that they have contravened section 3 (2) of the Imports and Exports (Control) Act. Such a contravention is punishable under section 5 of the same Act with imprisonment for a term which may extend to one year, or with fine, or with both. The proceedings instituted against the petitioners may in the normal course lead to their being placed on their trial for offences under this section. They are for that reason also accused persons within the meaning of Article 20 (3) of the Constitution.

It may perhaps be said that there has been no formal accusation in the sense that a complaint has been laid against the petitioners before a Magistrate. But that makes no material difference. In respect of contraventions of the Sea Customs Act and the Imports and Exports (Control) Act Customs Officers are competent to lay complaints before a Magistrate. The positions of these Officers is therefore analogous to that of Police Officers before whom information relating to cognisable offence has been laid. *Vide* Chapter XVII of the Sea Customs Act and in particular section 187-A which enacts that

"No Court shall take cognizance of any offence relating to smuggling of goods punishable under item 81 of the Schedule to section 167, except upon complaint in writing",

made by the appropriate Customs Officers. That being so, the Customs Officers cannot compel the petitioners to appear before them and give evidence.

On the other side, the learned Advocate-General explained that the word "offence" and the word "accused" occurring in Article 20(3) of the Constitution are used only in relation to proceedings instituted against a person in what may be called criminal Courts. This will be apparent if we read all the paragraphs in the Article together. Article 20 (1) speaks of conviction for any offence and enjoins that no person shall be *convicted* of any offence except for violation of a law in force at the time that the act was committed. The use of the word "conviction" would be inappropriate except in relation to a criminal Court. Article 20 (2) provides that no person shall be prosecuted and punished for the same offence more than once. The field to which the word "prosecute" properly applies has always been well understood as limited to criminal Courts. Article 20 (3) involves a continuation of the same idea and has no application except in relation to criminal Courts.

The learned Advocate-General further explained that though all contraventions of the Sea Customs Act are called offences in the Act itself, they are nevertheless capable of being dealt with in two ways. The Officers of the Customs Department may themselves complete the enquiry and where they think proper confiscate the goods and also impose a penalty. It is also open to them to prosecute the persons concerned in a criminal Court. Though the Officers of the department are empowered to confiscate the goods involved in contravention of the statute and also to impose a penalty on the persons concerned, nevertheless, it has been held that their proceedings are not criminal proceedings. Therefore, the persons whom the Officers of the Customs Department proceed against and on whom they might ultimately decide to impose a penalty, or in respect of whom they may order confiscation of the goods, are not accused persons within the meaning of Article 20 (3) of the Constitution.

The distinction between an act which is punishable under what may be called the criminal law, properly so called, and, an act in respect of which the departmental authority may impose a penalty but which nonetheless is not regarded as an offence, is explained in *Sivagaminatha* v. *Income-tax Officer*[1]. Rajagopala Ayyangar, J., who delivered the judgment of the Bench quoted with approval the following passages from the decision of Brandeis, J., of the American Supreme Court:

"Congress may impose both a criminal and a civil sanction in respect to the same act or omission: The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-payer's fraud."

He also quoted the following passages from the decision of Jackson, J., also of the American Supreme Court in a later case:

"The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determination of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubts The latter consist of penal offences enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other."

This distinction applies also to proceedings taken by the Customs Officers under the Sea Customs Act. Vide *Maqbool Hussain* v. *State of Bombay*[2], paragraph 17 and 18 of the judgment run as follows:—

"We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy.

It therefore follows that when the Customs Authorities confiscated the gold in question neither the proceedings taken before the Sea Custom Authorities constituted a prosecution of the appellant nor did the order of confiscation constitute a punishment inflicted by a Court or judicial tribunal on the appellant. The appellant could not be said by reason of these proceedings before the Sea Customs Authorities to have been "prosecuted and punished" for the same offence with which he was charged before the Chief Presidency Magistrate, Bombay, in the complaint which was filed against him under section 23, Foreign Exchange Regulation Act."

To the same effect is the decision in *Thomas Dana* v. *State of Punjab*[3]. It will be sufficient to quote the first two paragraphs of the head note:

"The proceedings before the Sea Customs Authorities under section 167 (8) of the Sea Customs Act are not "prosecution" within the meaning of Article 20 (2) of the Constitution. Therefore the fact that in such proceedings the customs authorities have both confiscated the goods and also inflcted a penalty on the person does not bring into operation the provisions of Article 20 (2) so as to prevent his prosecution and imprisonment under section 167 (81) of the Act read with section 23 and S. 23-B, Foreign Exchange Regulation Act and under section 120-B, Penal Code. In that view of the matter it is unnecessary to consider whether the action taken by the customs authorities amounted to "punishment" and whether the "same offence" was involved in the proceedings before the Revenue authorities and the Criminal Court.

"Prosecution" means a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial. The Chief Customs Officer or any other officer lower in rank than him in Customs Department is not a Court and that is made clear by the provisions of section 187-A of the Sea Customs Act."

The petitioners not being accused persons are therefore bound to appear before the Collector of Central Excise and answer all the questions put to them.

At one stage of the arguments there was a suggestion that section 132 of the Evidence Act would help to solve the problem. That section provides that a witness shall not be excused from answering any question upon the ground that the answer to such question would incriminate him or expose him to a penalty of forfeiture. But then there is a proviso which runs as follows:—

"provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

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1. I.L.R. (1956) Mad. 415. See pp. 424 to 427.
2. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730 : A.I.R. 1953 S.C. 325 (S.C.).
3. A.I.R. 1959 S.C. 375.

It was thought that the petitioners could be compelled to give evidence but that at the same time they could be protected from being prosecuted in a criminal Court on the basis of the answers elicited from them by calling this proviso in aid. But further investigation shows that this solution is not directly available ; because section 1 of the Evidence Act makes it plain that it applies only to judicial proceedings in or before any Court and proceedings before the Sea Customs Officers are not judicial proceeding. Nor do such Officers constitute Courts.

It is now necessary to examine some of the other decisions cited before me. Of these and a very important one is *M.P. Sharma* v. *Satish Chandra*[1]. I had occasion to study this case in connection with Writ Petition Nos. 291 and 292 of 1957 and there summarised the facts of that case and quoted the relevant passages from the Judgment which I reproduce below :

"The material facts there were as follows. The Registrar of Joint Stock Companies lodged information with the Inspector-General of Police, Special Police Establishment, New Delhi, to the effect that offences under sections 406, 408, 409, 418, 420, 465, 467, 468, 471 and 477 (*a*), Penal Code had been committed in connection with the affairs of Dalmia Jain Airways, Ltd. The Registrar of Joint Stock Companies also stated that to determine the extent of the fraud it was necessary to seize the books not only of Dalmia Jain Airways, Ltd., but also of various other allied concerns a list of which he furnished. On the basis of this information an application was made to the District Magistrate, New Delhi for the issue of search warrants under section 96 of the Criminal Procedure Code. Permission to investigate the non-cognisable offences mentioned in the report was also asked for. On the same day the District Magistrate ordered investigation and also issued search warrants. The persons concerned then went to the Supreme Court and applied for a writ to quash the search warrants and for the return of the documents that had been seized in execution of the search warrants that had been issued. The petitioners raised two contentions before the Supreme Court, *viz.*,

"that the fundamental rights of the petitioners under Article 20 (3) and Article 19 (1) (*f*) have been violated by the searches in question."

After disposing of the objections based on Art. 19 (1) (f) the court proceeded to examine the arguments based on Art. 20 (3). The arguments are thus summarised in the judgment.

"The fundamental guarantee in Article 20 (3) comprehends within its scope not merely oral testimony given by an accused in a criminal case pending against him, but also evidence of whatever character compelled out of a person who is or is likely to become incriminated thereby as an accused. It, therefore, extends not only to compelled production of documents by an accused from his possession, but also to such compelled production of oral or documentary evidence from any other who may become incriminated, thereby as an accused in future proceedings."

Jagannadhadas, J., who delivered the judgment of the Court observed,

"Thus, so far as the Indian law is concerned it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence. . .

* * * *

Broadly stated the guarantee in Article 20 (3) is against " testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to ithi barely literal import.

* * * *

A person can " be a witness " not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (*see* section 119, Evidence Act) or the like. " To be a witness " is nothing more than " to furnish evidence ", and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20 (3) is " to be a witness " and not to " appear as a witness ". It follows that the protection afforded to an accused in so far as it is related to the phrase " to be a witness " is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.

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1. 1954 S.C.J. 428 : 1954 S.C.R. 1077 : (1954) 1 M.L.J. (S.C.) 680 : A.I.R. 1954 S.C. 300.

* * *

Considered in this light, the guarantee under Article 20 (3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for 'production' of evidentiary documents which are reasonably likely to support a prosecution against them".

This decision makes it clear that the protection or immunity conferred by Article 20 (3) commences not merely from the point of time when a person accused of an offence is before the Court; it extends to a point of time further back. A person against whom a First Information Report has been laid before the police on which they are competent to act would be an accused person and he cannot be compelled to produce any document. It will be noticed that the Supreme Court did not accept the extreme contention which had been put forward by counsel for the petitioners and which I quoted a little earlier, *viz.*, that Article 20 (3) comprehends and prohibits the use of evidence "compelled out of a person who.........is likely to be incriminated thereby as an accused."

The next case that needs to be referred to is *Calcutta M. & C. Co.* v. *Collector of Customs*[1]. The petitioner in that case was a firm registered under the Indian Partnerships Act, and carrying on business in Calcutta. The customs authorities had information that the firm had been importing goods without valid licences and had been contravening the provisions of the Sea Customs Act in various other ways. They applied for and obtained search warrants from the Chief Presidency Magistrate, Calcutta and searched various premises and seized several properties. Thereafter the Customs Authorities issued a notice dated 19th May, 1955, to one Jagodia, a partner of the petitioner firm, requiring him to produce various files. On 20th May, 1955, another notice was issued by the Chief Inspector, Customs House, Calcutta, calling upon the partners of the firm to appear before him on 21st May, 1955. On 23rd May, 1955, a third notice was issued by another Officer of the customs Department requiring the petitioner firm to produce certain other documents. Sinha, J., who first heard the case, issued a writ of *mandamus* directing the customs authority to forbear from giving effect to these three notices.

On appeal this order was set aside. The learned Chief Justice who delivered the judgment of the Bench in *Collector of Customs* v. *Calcutta Motor & Cycle Co.*[2], remarked :

"But in any event, all statutes must yield to the Constitution and therefore it will be correct to hold that section 171-A, as such, is not bad, but the person summoned under its provisions will necessarily be entitled to claim the Constitutional privilege as soon as he is asked to answer a question or produce a document which he cannot answer or produce without incriminating himself, if he has previously been accused of an offence.

* * *

In my view, full effect can be given to the constitutional guarantee without holding any part of the section to be void. The protection to which the respondents are entitled under Article 20 (3) is a protection against self-incrimination and not protection against anything else. So long as they are not compelled to answer a question by answering which they may incriminate themselves, or compelled to reproduce an incriminating document, they cannot complain that they have been asked to appear before the customs authorities or to produce documents."

In other words, the petitioners were required to appear but they were not required to answer all the questions that might be put to them.

The Court finally allowed the appeal in these terms :—

"For the reasons given above the appeal is allowed and the order of the learned Judge quashing the orders contained in the notices dated, respectively, the 19th May, the 20th May and the 23rd May, 1955 and the order for a writ of *mandamus*, directing the Appellants to forbear from giving effect to them is set aside, subject to the reservation as to the right of the Respondents to claim the constitutional immunity if and when they think they are going to be subjected to self-incrimination, as I have explained above."

Learned Counsel for the petitioners referred to *Counselman* v. *Hitchcock*[3], a decision of the Supreme Court of the United States, where it was held:

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1. A.I.R. 1956 Cal. 253.
2. A.I.R. 1958 Cal. 682.
3. 35 L.Ed. 547.

"the privilege given by the Fifth Amendment to the Constitution that no person shall be compelled in any criminal case to be a witness against himself extends to a proceeding before a grand jury."

By way of analogy it was suggested that the protection will also extend to any investigation conducted by the Officers of the Sea Customs Department in our country.

I do not think that the analogy really helps because the position of the grand jury is entirely different from that of the Officers of the Sea Customs Department. If the grand jury adopted a certain view the prosecution of the person concerned would follow as a matter of routine. Therefore, a person being interrogated by the grand jury is really in the position of an accused person. But that is not so in the case of persons whom the Officers of the Customs Department seek to interrogate.

The same observations would apply to the case reported in *Hoffman* v. *United States*[1].

In *McCarthy* v. *Arndstein*[2], it was held that the constitutional protection of at witness against self-incrimination applies in civil proceedings also. This makes it clear that the scope of the protection which a witness enjoys against self incrimination is not quite the same under our Constitution as under the American Constitution. In fact, Article 20 (3), as explained is available only in relation to a proceeding in a criminal Court and .herefore the field of protection in India would appear to be narrower than in United States of America.

In a matter of this kind we must evolve a workable compromise and effect an adjustment between two lines of thought and two conflicting interests. On the one hand we must resolutely set our faces against the methods and techniques evolved by the Star-Chamber-methods which would repidly enable a Police State to be built up. On the other hand, society must be protected, and, this can be done only by tracking down offenders and punishing them according to law. This cannot be done if persons likely to have relevant information cannot be questioned and compelled to answer. To carry immunity from being questioned beyond a certain limit would be to make the country safe for lawless elements. This is the matter in its broad aspects.

Except in those cases where the identity of the offender is at once known, various process-occur between the stage when an offence is committed and the stage when the offender is placed before a criminal Court, to be dealt with according to law. The residents of the locality where the crime has been committed, or those who are believed or alleged to have been in the vicinity of the scene when it was committed, may have to be examined. At this stage no one is an accused person in any sense of the term. The circle of enquiry would in time become smaller and the stage would be reached when there is a certain amount of suspicion against various persons. Even now it would be correct to say that there is no accused person. Then the final stage is reached when the investigating authority considers that a particular person has committed the offence and decides to proceed against him in a criminal Court. It is at this last stage that a person really becomes accused of an offence.

I asked the learned Advocate-General whether in either of these two cases the authorities of the Customs Department had made up their minds to prosecute the petitioners in a criminal Court, and, I understood him to say that they have yet to ascertain the facts and so were not in a position to make up their minds to prosecute or not.

It was then replied that by this simple device of pretending that they have not made up their minds and that therefore the petitioners have not become accused persons they could be compelled to answer questions put to them, and, that these answers might be used later on to secure their conviction.

In respect of this apprehension it may be sufficient to point out that the law is not so helpless that it can be defeated by pretences of the kind it is alleged the department

1. 95 L.Ed. 1118. 2. 69 L.Ed. 34.

may resort to. If the stage is reached when a person can be properly said to be an accused person, and, thereafter he is compelled to answer questions, and the material obtained thereby sought to be used against him, Article 20 (3) of the Constitution would come into play and the Court can—apart from all statutory provisions—refuse to look at the material obtained by contravening the Constitution. That would be a case where, if there were no special statutory authority in that behalf, Courts would be entitled to fall back upon their inherent power to prevent an abuse of the process of the law. This will involve nothing more than a logical extension of the principle embodied in section 132 of the Evidence Act.

The position may be thus summarised. (1) When they conduct proceedings which may terminate in the confiscation of goods or the imposition of penalties which they can themselves impose, without reference to any criminal Court, Customs Officers are not acting as Courts of law and the proceedings before them are not judicial proceedings—except for the limited purposes of sections 193 and 228 ,Indian Penal Code (2). To the persons examined in such proceedings section 132 of the Evidence Act would not apply of its own force. (3) But as they are empowered to prosecute for contraventions of the Sea Customs Act the position of Customs Officers will in certain respects be analogous to that of Police Officers acting on information relating to a cognizable offence. (4) A person who has been examined by the Customs Officers will not be in the position of an accused till it can be fairly and properly said that he is likely to be proceeded against in a criminal Court. (5) Though the question when a person becomes an accused person would depend on the decision that the departmental Officers may take, they cannot by merely pretending that they have not made up their minds circumvent the provisions of Article 20 (3). (6) Whether a witness or a suspect has become an accused person in any particular instance is substantially a question of fact.

It is impossible to say that in this case the position of the petitioners at present is that of persons accused of any offence. They have not been charged with any criminal offence, either formally or informally. No proceedings under the criminal law have been instituted against them. The notices issued to them no doubt allege that there is a reason to believe that the goods mentioned in the schedule attached to the notices have been imported without payment of customs duty. But then, the notices make it plain that the liability sought to be imposed upon the petitioners is only under section 167 (8) of the Sea Customs Act. That provides only for the imposition of departmental penalties. As the petitioners are therefore not persons accused of any offence they are bound to appear in obedience to the summons issued to them and answer questions that may be put to them. If they are asked questions the answer to which are likely to incriminate them, it will be open to them to claim the protection provided by Article 20 (3) of the Constitution. If that claim is overruled and they are compelled to answer those questions, then such answers will not be admissible in evidence against them should they be at a later stage prosecuted in a criminal Court. That will be one way of implementing the protection conferred by Article 20 (3). But, it will be open to the Department to take into account any answer that may be given for the purpose of determining what departmental penalties, if any, should be imposed upon the petitioners. It is very desirable that the departmental Officers, in their turn, should make it plain to the petitioners at the earliest moment they can do so whether it is intended to proceed against them in a criminal Court or not. If it is made plain to the petitioners that there is no intention to proceed against them in a criminal court then no question of invoking the shield of Article 20 (3) could possibly arise, and, the petitioners will be bound to answer all the questions put to them, and these answers, as I said before, can be taken into account for imposing departmental penalties. But, if it is intended to prosecute the petitioners in a criminal Court they cannot be compelled to answer any question the answer to which is likely to incriminate them. If, nevertheless, they are forced to answer such questions the answer so obtained cannot be used in evidence against them at their trial.

All these having been made clear these petitions are dismissed with costs. Advocate's fee Rs. 250, one set.

R.M. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes, Madurai Division, Madurai .. *Petitioner**

v.

The Indian Coffee Board, Batlagundu, Madurai District .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 12—*Powers of Deputy Commissioner to revise assessment—Scope and extent of—If exists even after orders of assessment are taken up on appeal and revision.*

The scheme and provisions of the Madras General Sales Tax Act, 1939, makes it clear that an order of assessment is treated as a single entity subject to a right of appeal conferred on the tax payer and a limited right to the State to get errors in assessment revised by the Competent authorities. Though the Statute envisages two sets of remedies *viz.*, appeals and revision, the former being available only to the assessee and latter both to the assessee and the State, the order of assessment itself is not treated as a severable one with respect to each item of the total turnover, *viz.*, the part objected to by the assessee or by the State. It is not correct to say that the Act provides two independent hierarchies of tribunals, one to exercise appellate jurisdiction and the other to exercise revisional jurisdiction in the interests of the Revenue, each functioning independent of the other in their respective fields with reference to the same order of assessment.

Hence the jurisdiction of the Deputy Commissioner under section 12 of the Act to revise an order of assessment, ends when the Appellate Tribunal has passed an order in respect of that assessment in the exercise of its appellate jurisdiction. Apart from cases of escaped assessment for which separate provision is made under the rules, an order of assessment under the Act is a single and indivisible one capable of being set aside either by appeal or revision. Independent of any theory of merger when once an order of assessment has been the subject-matter of an appeal (even though the right of appeal is conferred only on the assessee and not on the States) and the order has been superseded by the order of the Appellate Tribunal, the Deputy Commissioner has no jurisdiction thereafter to exercise his powers of revision under section 12 of the Act. It is all the more clear that such a power could not be exercised when the order of assessment has been the subject-matter of a final adjudication by the High Court in revision.

Petition under section 12 (*b*) (i) of the Madras General Sales Tax Act (1939), praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 10th September, 1955 and made in Tribunal Appeal No. 3 of 1955, (S.M.R. 3/54-55 on the file of the Deputy Commissioner of Commercial Taxes, Madurai Division).

The Government Pleader (*K. Veeraswami*) on behalf of the Petitioner.

M. Subbaraya Iyer and *V. Sethuraman*, for Respondent.

The Court made the following

ORDER.—The Indian Coffee Board, Batlagundu, the petitioner, was assessed to sales tax on a turnover of Rs. 3,89,38,275/- for the assessment year 1949-50. The Deputy Commercial Tax Officer who ordered the assessment excluded a turnover of Rs. 33,73,733 on the ground that this represented sales of coffee exported outside the Indian Union.

The petitioner contended that it was not a dealer at all and that it was not liable to be assessed to sales tax. Even the assessment ordered by the Deputy Commercial Tax Officer was challenged by an appeal to the Commercial Tax Officer. That appeal was dismissed on 31st May, 1951. A further appeal to the Sales Tax Appellate Tribunal failed, and, the Tribunal affirmed the order of assessment on 24th July, 1952. A revision under section 12-B of the Madras General Sales Tax Act to this Court also failed. The judgment of this Court delivered on 14th April, 1954, was reported in *Indian Coffee Board, Batlagundu* v. *The State of Madras*[1].

After the Tribunal had dismissed the appeal preferred to it by the petitioner and during the pendency of the revision petition in this Court the Deputy Commissioner of Commercial Taxes, Madurai, initiated proceedings *suo motu* under section 12 of the

* T.R.C. No. 39 of 1956.

23rd September, 1959.
(1st Asvina—1881 Saka.)

1. 5 S.T.C. 292.

Act to revise the assessment confirmed by the Commercial Tax Officer. The Deputy Commissioner issued a notice to the assessee on 31st March, 1954, to show cause why the assessment should not be revised. The Deputy Commissioner was of the view, that the turnover of Rs. 33,73,733 was not entitled to any exemption, as the assessee did not export the coffee itself but had sold the coffee to other dealers in the State who alone exported that coffee outside the Indian Union. In addition the Deputy Commissioner found that a turnover of Rs. 3,03,187-8-0 was also liable to be taxed as also a further sum of Rs. 4,733-5-0, which represented sales tax. The objections of the assessee were overruled, and the Deputy Commissioner revised the assessable turnover for 1949-50 and included these three items also.

It should be noticed that the proceedings taken by the Deputy Commissioner were under section 12 of the Act in the exercise of his revisional powers. There was no occasion to have recourse to Rule 17 of the Madras General Sales Tax Rules, which applied to turnovers which escaped assessment.

Against the order of the Deputy Commissioner the assessee preferred an appeal to the Tribunal. The Tribunal held that, as the order of the original assessment had been appealed against to the Tribunal and thereafter the matter was taken up further to the High Court in revision, the order of the Commercial Tax Officer should be deemed to have finally merged in the order of the High Court, and that the Deputy Commissioner had no power to re-open the assessment in exercise of his revisional jurisdiction. This Tribunal, therefore, excluded from the assessable turnover of the assessee the two sums, Rs. 33,73,733 and Rs. 3,03,187-8-0. The Tribunal, however, held that the assessee was liable to sales tax on the sum of Rs. 4,437-5-0, which represented amounts collected by the assessee by way of tax.

The State of Madras applied under section 12-B of the Act to revise the order of the Tribunal.

The learned Government Pleader contended that there could be no question of any merger of the order of the Commercial Tax Officer in its entirety in the judgment either of the Appellate Tribunal or that of the High Court. The learned Government Pleader pointed out that only the assessee could have appealed against the order of the Commercial Tax Officer, and that only in so far as the assessment order was against the assessee ; such an appeal could not be deemed to comprehend that portion of the order of the assessing officer which was in favour of the assessee, for example, the exemption granted to the assessee on the turnover of Rs. 33,73,733. The State itself had no right to appeal to the Tribunal against the order of the Commercial Tax Officer. Therefore, the learned Government Pleader contended, the only remedy open to the State, when there was an order to the prejudice of the revenue of the State, was for the Deputy Commissioner to exercise his revisional jurisdiction under section 12 (2) of the Act. The learned Government Pleader urged that irrespective of the fact, whether there was an appeal by the assessee or not, the Deputy Commissioner had jurisdiction to revise the order of the Commercial Tax Officer in so far as it was to the detriment of the interest of the State.

In effect the contention of the learned Government Pleader was that the Act provided for two hierarchies of Tribunals functioning simultaneously to deal with separate parts of an assessment. Whether the Act does provide for it is the question. Under section 11 the assessee can appeal to the Commercial Tax Officer against the order of assessment. Under section 11 (4) the decision of the Commercial Tax Officer, as the appellate authority, is final, subject to the provisions of sections 12 to 12-C. Against the order of the Commercial Tax Officer a further appeal is provided for to the Tribunal, again only at the instance of the assessee. The asessee can also challenge any order in revision passed by the Deputy Commisioner or by the Board of Revenue acting *suo motu* by preferring an appeal to the Appellate Tribunal and to the High Court respectively. See sections 12-A and 12-C. Thus the order of assessment, either original, appellate or revisional, can be appealed against to the appropriate tribunal. But, the right of appeal is conferred only on the assessee. The assessing authority and the officers of the Department, including the Commercial Tax Officer, and the

Deputy Commissioner, are departmental officials, to whom is entrusted the function of levying and assessing tax, and normally no prejudice could be expected to be caused to the revenue by orders of the Department. Even so, errors and mistakes may occur in an assessment. Powers to revise the orders of assessment are, therefore, conferred under section 12 on the Commercial Tax Officer, the Deputy Commissioner and the Board of Revenue, each vested with the authority to revise the order of the officers subordinate to it. Such powers of revision could be exercised (1) *suo motu*, or (2) on the application of the assessee. The latter jurisdiction could be exercised only if no appeal is preferred by the assessee. Thus an order of assessment, if prejudicial to the State, could only be revised by the appropriate authority and cannot be appealed against by the Department. The revisional powers conferred on the High Court to revise the orders of the Tribunal, however, can be invoked either by the assessee or by the State. That is the scheme of the statutory provisions for appeals and revision.

These provisions make it clear that an order of assessment is treated as a single one subject to an appeal by a tax-payer, the State being left with the limited right to get the orders revised by the competent authority to correct errors in assessment. The powers of revision conferred on the respective authorities may be exercised both for the benefit of the State and the tax-payer. There is nothing in section 12 to warrant an assumption, that such powers are given only to protect the interests of revenue and not to protect the interests of the tax-payer as well. Though the statute envisages two sets of remedies, appeals and revision, the former being available only to the tax payer and the latter both to the tax-payer and the State, the order of assessment itself is not treated as a severable one with respect to each item of the total turnover. We are unable to see any basis in principle or authority for a view, that the Act provided two independent hierarchies of tribunals one to exercise appellate jurisdiction and the other to exercise revisional jurisdiction in the interests of the State, each functioning independent of the other in their respective fields with reference to the same order of assessment.

Section 12 (2) states :

"The Deputy Commissioner may—

(i) *suo motu*, or

(ii) in respect of any order passed or proceeding recorded by the Commercial Tax Officer under sub-section (1) or any other provision of this Act and against which no appeal has been preferred to the Appellate Tribunal under section 12-A, on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."

Section 12 (4) (*b*) is to this effect :

"In relation to an order of assessment passed under this Act—

* * * * * * *

(*b*) The power of the Deputy Commissioner under clause (i) of sub-section (2) and that of the Board of Revenue under clause (i) of sub-section (3) shall be exercisable only within a period of four years from the date on which the order was communicated to the assessee."

It will be noted that a revision petition at the instance of a party can be entertained by the Deputy Commissioner under section 12 (2) (*ii*) only if no appeal has been preferred against the order under section 12-A. No such limitation, however, restrains the exercise of the revisional powers *suo motu*, the only limitation being what is contained in section 12 (4) (*b*). There is thus no impediment to the exercise of revisional powers *suo motu* by the Deputy Commissioner even after an appeal has been filed to the Tribunal. But the question remains, whether that power or jurisdiction to revise would subsist even after the Appellate Tribunal has passed its order on the appeal, either confirming or modifying or setting side the order of the Commercial Tax Officer. It must be noticed that if the Deputy Commisioner, purporting to act under section 12 (2) (*i*) *i.e.*, acting *suo motu*, passed an order prejudicial to the assessee, the latter can prefer an appeal against such an order to the Tribunal under ection 12-A. If the Tribunal had already passed an order on an appeal by the asses-

see against the order of the Commercial Tax Officer, it should be anomalous to have another appeal on the same subject-matter, *viz.*, the assessment, to the Tribunal, after the Deputy Commissioner has passed an order in exercise of his revisional jurisdiction with reference to the same assessment. Principle and reason suggest that there should be no scope for the appellate Tribunal adjudicating on the same assessment over again, and that the jurisdiction of the Deputy Commissioner should end when the Appellate Tribunal has passed its order in exercise of its appellate jurisdiction.

We have already pointed out that an order of assessment should be viewed as single and indivisible. In an appeal filed to the Appellate Tribunal under section 12-A, although the Tribunal is not entitled to increase the assessment, there is nothing to preclude the Tribunal from considering the propriety of the order appealed against, that of the Commercial Tax Officer, in so far as it was against the State, provided the final order has not the effect of enhancing the tax liability. The appeal would, however, be against the order of assessment as a whole, in which the whole assessable turnover could be considered, though interference could be only in favour of the assessee, *e.g.*, where the Commercial Tax Officer disallows a turnover on a wrong view, but equally wrongly included a turnover, an appeal can only be in regard to the order against the assessee. It would, however, be open to the Tribunal to retain or alter the assessment without increasing it by taking a correct view of the whole matter and by deleting the latter turnover and including the former in the assessable turnover. The existence of such a power would show that the whole order of the Commercial Tax Officer forms the subject-matter of the appeal. When, therefore, the Appellate Tribunal passes an order under section 12-A (4), the order of the Commercial Tax Officer would be superseded by that of the Tribunal. There is still only a single order of assessment. Under section 12 (2) of the Act the Deputy Commissioner can have no jurisdiction to revise the order of the Tribunal. If the Deputy Commissioner might act *suo motu* even after the Tribunal has disposed of the appeal, it would imply that the Tribunal's order itself was not final even so far as it was concerned, because the assessee has the right to challenge the order of the Deputy Commisioner by an appeal to the Tribunal under section 12-A of the Act. Recognition of such simultaneous exercise of powers would obviously lead to inconvenience, confusion and uncertainty in a matter of taxation. A power to alter assessment by two independent hierarchies of tribunals, simultaneously functioning with reference to separate portions of the same order o^ assessment would not b conducive either to the interests of the State or to the interests of the tax-payer. It should be remembered that provision has been made in the rules to assess escaped turnover. We have pointed out that in this case no question arose of having recourse to the powers vested by rule 17. Where it is not a case of escaped assessment, an order under section 9 of the Act should be held to be a single assessment, comprehending within it the entire assessable turnover and capable of being set aside either by appeal or by revision, but there being only one final order of assessment all through. We are unable to see anything in the provisions of the Act to justify the principle that an assessment or an order on appeal therefrom is a severable one, liable to be simultaneously interfered with by two independent authorities or Tribunals.

The Appellate Tribunal held that the order of the Commercial Tax Officer was merged in the order of the Appellate Tribunal. Independent of any theory of merger of the order of the subordinate authority in the order of the appellate authority; we are of the view that the provisions of the Act, do not warrant the existence of any power in the Deputy Commissioner to interfere under section 12 of the Act with an order of the Commercial Tax Officer passed under section 11, when such an order has itself been superseded by the order of the Appellate Tribunal. In the present case, the assessment order went a stage further. There was the final disposal by the High Court under section 12 B of the Act. The Deputy Commissioner had no jurisdiction to revise an assessment which had been the subject-matter of a final order of theHigh Court, *i.e*, an assessment to which the statutory finality attached itself only under the order of the High Court.

The view taken by the Tribunal that the order of the Deputy Commissioner was beyond his jurisdiction is correct. The petition fails and is dismissed with costs. Advocate's fee Rs. 100.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Varadarajulu Iyer .. *Appellant**

v.

Arumugha Goundan and others .. *Respondents.*

Specific Relief Act (I of 1877), section 24 (b)—Specific performance of a contract to sell immovable property—Time when essence of the contract—Distinction between a contract of sale and reconveyance.

The respondents sold the property to K. K. after a few months sold the same to the appellant. The appellant granted a lease of the same to the respondents. The lease imposed certain conditions as to the regular payment of rent and forfeiture of the rights under the lease in default thereof. Two weeks after the lease the appellant entered into an agreement with the respondents to sell the property. It was also agreed that the respondents would forfeit their rights under the agreement if they did not carry out faithfully the conditions of the lease. The respondents committed default in payment of rent.

Held : The question whether time was of the essence of a contract would depend on the intention of the parties. A mere stipulation as to time for performance cannot make it an essential term. But a contract may, by express stipulation, make a term therein as to the time for performance as an essential term ; or even if there is no such express term such a provision can be implied in the circumstances.

It has been held that as a general rule time would not be of the essence of the contract in regard to an agreement for sale of immovable property. But in regard to contract of repurchase or reconveyance of immovable property there is generally an outright sale accompanied by an agreement to reconvey the same within the stipulated time. This could be considered only as conferring a power or privilege and in the nature of an option on the original vendor. Being thus in the nature of power or privilege it should be construed strictly and any stipulation as to the time for the exercise of the power would govern the same and would be an essential term of the contract.

In the instant case the contract is not one for reconveyance but one of sale. There is no indication in the contract that time was its essence. Indeed the agreement providing a term of 7 years for the completion of the contract cannot *prima facie* be held to be one where time was considered as the essence. Therefore non-performance of one of its terms, namely, the regular payment of rent in respect of the collateral transaction of the lease would not amount to a breach of any essential term of the agreement for sale. The default in the punctual payment of rent under the lease deed which was stipulated to entail forfeiture of the rights under the agreement of sale can be relieved against and specific performance can be directed.

Case law discussed.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of the Hon'ble Mr. Justice Krishnaswami Nayudu, dated 20th April, 1956, in S.A. No. 1087 of 1953 preferred to the High Court against the decree o the District Court of Salem in A.S. No. 49 of 1951 (O.S. No. 242 of 1950, Sub-Court, Salem).

T. Venkatadri and *T. Ramakrishna* for Appellants.

N. S. Raghavan, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J—This is an appeal under clause 15 of the Letters Patent against the decree and judgment of Krishnaswami Nayudu, J., in S.A. No. 1087 of 1953.

The suit, to which the appeal relates, was one for specific performance of an agreement of sale executed by the appellant in favour of respondents 1 and 2. Since the filing of the appeal, the first respondent died, and respondents 2 to 4 are on record representing her interest. The properties orginally belonged to the first respondent, and she along with her husband and children, executed a deed of sale in

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*L.P. Appeal No. 94 of 1956. 17th September, 1959.
(26th Bhadra 1881—Saka.)

favour of one Kuppuswami. A few months after the sale, on 11th November, 1943, Kuppuswami conveyed the properties to the appellant. On 15th November, 1943, the appellant granted a lease of the properties to respondents 1 and 2 for a period of 5 years on a yearly rent of Rs. 270—the lease imposed certain conditions as to the regular payment of rent and forfeiture of the rights under the lease in default thereof. Two weeks after the grant of the lease, there was an agreement, Exhibit A-1, entered into between the parties under which the appellant agreed to sell to respondents 1 and 2 the properties for a consideration of Rs. 3,300. It was stipulated that the agreement should be performed within a period of 7 years. A sum of Rs. 10 was paid towards the price on the date of the agreement and the balance was to be paid at the time of the conveyance. It was also agreed that the purchasers, respondents 1 and 2, would forfeit their rights under the agreement if they did not carry out faithfully the conditions of the lease under which they were then in possession of the properties. The portion relating thereto in Exhibit A-1 runs :

" Further in accordance with the condition set out, the lease deed under which possession of these properties were given to individuals 2 and 3 on 15th November, 1943, by individual No. 1 if (any) default is committed, and (or) if individuals Nos. 2 and 3 fail to pay to individual No. 1 the aforesaid sum of Rs. 3,290 within the time stipulated above, this agreement shall stand cancelled as per the (terms of) agreement mentioned herein without reference to the said time limit ".

There was a default in regard to payment of rent under the lease-deed. Thereupon, the appellant under Exhibit B-4 proceeded to cancel the agreement to sell. He also filed O.S. No. 389 of 1946 on the file of the District Munsif 's Court, Salem, for recovery of possession of the properties, together with the arrears of rent. The suit was dismissed on the ground that there was no valid service of notice previous thereto. A fresh suit, after giving the necessary notice, O.S. No. 186 of 1949, was filed for the same reliefs. That suit was decreed. Against the decree, respondents 1 and 2 filed an appeal to the District Court, Salem, which was subsequently transferred to the Sub-Court, and registered as A.S. No. 2 of 1951. In the meanwhile, they had instituted O.S. No. 242 of 1950 in the same Court, the suit out of which this appeal arises for specific performance of agreement of sale. Both the appeal and the suit were heard together and disposed of by a common judgment. In the appeal, the learned Subordinate Judge sustained the decree for arrears of rent, but dismissed the claim for possession. In the suit, he passed a decree, directing specific performance.

It is admitted that the decree relating to the arrears of rent has been paid and satisfied. But the appellant filed an appeal to the District Court, Salem, against the decree for specific performance. That failing, second appeal was taken to this Court. Krishnaswami Nayudu, J., who heard the appeal, agreed with the conclusions arrived at by the lower Courts, and dismissed it. While so doing, the learned Judge granted leave under clause 15 of the Letters Patent, for a further appeal.

Under the agreement of sale, Exhibit A-1, it was stipulated that respondents 1 and 2, who happened to be in possession of the properties as lessees, should not merely pay the balance of the consideration for the sale within the time specified, but, also perform the obligations under the lease-deed, as stipulated therein. The obligation to pay rent punctually was primarily one under the lease deed, where there was also a provision for default. But Exhibit A-1 which came into existence subsequently, provided that non-payment of rent in the manner agreed to would entail a forfeiture of rights of respondents 1 and 2 under the agreement. Krishnaswami Nayudu, J., held that the provision in Exhibit A-1, enabling the appellant to cancel the agreement of sale for default in the regular payment of rent, amounted to a penalty which could be relieved against, and that the lower Courts were justified in relieving the defaulters from the consequences of their omission, and in decreeing specific performance of the agreement of sale.

It was contended before us that the provision in Exhibit A-1 which enabled the seller to cancel the agreement in the event of the purchaser defaulting in the performance of another agreement, would not amount to a penalty, as it was open to a person in the position of the appellant to agree to sell for a certain consideration provided that, in the meanwhile, the rents were regularly paid. A default, therefore, in

the regular payment of rent would amount to a breach of the conditions of the agreement, and such a breach could not be relieved against by the Court.

It has to be considered whether regular payment of rent was a condition precedent to the enforcement of rights under Exhibit A-1. The effect of stipulations as to the punctual payment of rent in the agreement of sale would at best amount to an incorporation therein of the terms of the lease-deed. If so treated, the provision in the latter would become a term in the agreement for sale. A default in the payment of rent would thus, constitute non-performance of one of the terms of the agreement within the time prescribed therein. Would such default of payment of rent entitle the seller to repudiate the agreement of sale? The general rule is that a plaintiff, who seeks specific performance of an agreement, should show that he has performed, or has been ready and willing to perform all the obligations on his part under the contract and is further ready and willing to do so in regard to the things to be done by him in future. Although no provision of the Specific Relief Act expressly states that a plaintiff in a suit for specific performance should aver his readiness and willingness to perform his part of the contract, it has been held that it is necessary in such a suit to allege his readiness and willingness to perform his part of the contract. Vide *Arjuna Mudaliar* v. *Lakshmi Ammal*[1]. Section 24 (*b*) of the Specific Relief Act states that

"specific performance of a contract cannot be enforced in favour of a person who violates any essential term of the contract that on his part remains to be performed".

In the present case, it is stated that respondents 1 and 2 violated an essential term of the contract, *viz.*, that relating to the punctual payment of rent. The question is whether a violation of such a term would amount to one which would show that he was not ready and willing to perform his part of the contract, or would disentitle him to the relief as to specific performance. Sir Edward Fry in "A Treatise on the Specific Performance of Contracts" (4th edition) states at page 404:

"Of what terms must the plaintiff show the performance? The answer is that he must show performance of—

(i) All conditions precedent;

(ii) The express and essential terms of the contract;

(iii) Its implied and essential terms, and

(iv) All representations made at the time of the contract on the faith of which it was entered into; but that he need not show performance of

(v) Non-essential terms;

(vi) The terms of a collateral contract, or

(vii) The terms of which the defendant has prevented or waived the performance.

Lastly, it will be necessary to consider

(viii) Terms, the performance of which has become impossible without the plaintiff's fault or default."

It is contended that regular payment of rent was a condition prececent attached to the obligation under the agreement. Independent of the stipulation as to time for the payment of the rent and price, there is no other condition imposed on the purchaser before he would be entitled to the rights created under Exhibit A-1. Therefore, if it were to be heldt hat punctualpayment of the rent within the time specified in the lease-deed was an essential term under Exhibit A-1, it could be said that it was a condition precedent for requiring the appellant to execute a sale-deed. If, on the other hand, it were to be held that the stipulation as to the payment of rent within the time specified was not essential part of the contract for sale, it would follow that there would be no such condition precedent. It has, therefore, to be seen whether the time fixed for payment of rent under the lease-deed, which should be deemed to be incorporated in Exhibit A-1 was of the essence of the contract. Section 55 of the Indian Contract Act, so far as it is relevant, states:

1. (1948) 2 M.L.J. 271.

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified terms, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

"If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

The question whether time was of the essence of a contract would depend on the intention of the parties thereto. A mere stipulation as to time for performance cannot make it an essential term. But a contract may, by express stipulation, make a term therein as to the time for performance, as an essential term : or even if there is no such express term, such a provision can be implied in the circumstances. In *Jameshed* v. *Burjorji*[1], the Privy Council held that, as a general rule, time would not be of the essence in regard to an agreement for sale of immovable property. The reason for the rule appears to be that, under equitable principle which governs the rights of the parties in cases of specific performance of contracts to sell real estate, the Court looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time. But time can be made the essence of contract even in regard to an agreement to convey immovable properties either by express stipulation or by subsequent notice. The general rule is that an intention to make time the essence of the contract should be absolutely clear. Therefore, in an ordinary agreement of sale of immovable property which creates mutual rights and obligations, where time is not made the essence of contract, failure to perform certain of the obligations thereunder by one party or the other, in accordance with the strict letter of the contract, that is, within the time fixed thereby, cannot be held to be a breach of an essential term. This would be so even in a case where the contract provided that the non-performance f such terms would entail the forfeiture, or cancellation of the rights thereunder, the reason being that once Court finds that time was not of the essence, such a term should be construed as one *in terrorem* and relieved against. In a case, therefore, where time was not of the essence of the contract, it would follow that non-performance of the obligations within the time specified would not constitute a breach of an essential term of the contract, and as such it could not be stated that the plaintiff in a suit for specific performance was not ready or willing to perform his part of the contract in order to constitute a valid defence to such action.

But there may be cases where time is made the essence of the contract. There may be also cases, where, though time was not made expressly as the essential term of the contract, the substance or nature of the contract is such that time would be deemed to be of the essence. In regard to contracts relating to immoveable property, such cases occur in contracts for repurchase or reconveyance of property. In those cases, there is generally an outright sale of the property accompanied by an agreement to reconvey the same on being so required to do by the original vendor within the stipulated time. As was observed in *Balasundara Mudaliar* v. *Muthuvenkatachala Mudaliar*[2], the title of the first purchaser in such cases would be practically in abeyance till after the expiry of the period mentioned in the agreement, as such title would be lost at the option of the other party. In such cases it would be inequitable to hold that time would not be of the essence of the contract, as there would be uncertainty in the title of the first purchaser. In those cases time should be and is always considered of the essence of the contract. That is so, for another reason as well. A sale followed by contract of re-conveyance which obliges the purchaser to reconvey the property at the request of the original vendor within the time specified could be considered only as conferring a power or privilege on the original vendor. For one thing, there is seldom any mutuality in such a contract

1. (1915) 43 I.A. 26: 30 M.L.J. 186: I.L.R. 40 Bom. 289 (P.C.).

2. (1954) 2 M.L.J. 141.

for recovyeance, *e.g.* it would not be open to the first purchaser to insist upon the original vendor purchasing back the property within the particular time. The right created under the agreement is in favour of the original vendor to be exercised at his option. That could, therefore, be construed only as mere power or privilege. In *Samarapuri Chettiar* v. *Sudarsana Chettiar*[1], it was held that the principle that time might not be of the essence of the contract in cases of agreements for sale of immoveable property, would not be applicable to re-sale of the property conveyed. Sadasiva Ayyar, J., observed that the right to re-purchase was an option and must be exercised according to the strict terms of power.

Being thus in the nature of power or privilege, it should be construed strictly and any stipulation as to the time for the exercise of power would govern the same and would be an essential term of the contract. In " A Treatise on the Specific Performance of Contracts " (4th edition) at page 472, Sir Edward Fry states :—

" Where the contract contains stipulations in favour of one party and not of the other, as, for instance, an option is in anywise unilateral, the Court if it does not consider time as originally of the essence, will, as we shall hereafter see, look at it with more than usual strictness."

Again at page 476 it is stated :—

"Where the contract is in anywise unilateral, as, for instance, in the case of an option to purchase, a right of renewal, or of any other condition in favour of one party and not of the other, then any delay in the party in whose favour the contract is binding is looked at with special strictness".

The distinction between two types of cases, namely, where (1) there was an ordinary agreement for sale with mutual rights and obligations and (2) an agreement which is unilateral amounting to nothing more than an option to repurchase was recognised in *Shanmugham Pillai* v. *Annalakshmi Ammal*[2]. In that case there was a sale of certain properties by a person to another. As a part of the same transaction of the sale, two further transactions were entered into (1) a lease-back of the properties by the purchaser in favour of the vendor and (2) an agreement for sale between the parties under which it was stipulated that if the agreed consideration was paid within the particular time, the properties would be re-conveyed by the purchaser to the vendor. It was expressly stipulated in the agreement of sale that time was of the essence of the agreement, and if there was default committed in respect of the regular payment of rent, the rights thereunder would be forfeited. Under the power reserved in the lease deed the lessor's representative terminated the lease, and also declared that the agreement to reconvey had become cancelled. A suit for specific performance at the instance of the original vendor was resisted on the ground that the default in the payment of rent entailed a forfeiture of the rights under the agreement. The judgment of the majority of the learned Judges of the Federal Court held that, on a construction of the agreement, it was a contract for re-conveyance, and what the vendor obtained was only a concession or privilege under the agreement. They held that the conditions for the exercise, should be strictly complied with, and, they not having been complied with, the action for specific performance failed. At page 687, Patanjali Sastri, J., observed :—

" It is well settled that, when a person stipulates for a right in the nature of a concession or privilege on fulfilment of certain conditions with a proviso that in case of default the stipulation should be void, the right cannot be enforced if the conditions are not fulfilled according to the terms of the contract. Such conditions, though relating only to payment of money, are not regarded as a penalty and Courts of equity will not afford relief against a forfeiture for their breach ".

Mahajan and Mukherjea, JJ., dissented from the view of the majority in regard to the construction of the agreement of sale. They held that the case was not one where a privilege had been conferred on the original vendor, and it was open to the purchaser to enforce specific performance of the agreement to re-convey the property and maintain a suit to recover the price if the original vendor refused to purchase the property. (*Vide* page 696). It was, therefore, held that time was not of the essence of the contract, and the default in the payment of rent should be relieved against. It will be seen that the difference between the learned Judges was

1. (1919) 37 M.L.J. 109 : I.L.R. 42 Mad. 802. 2. (1950) 1 M.L.J. 683.

on the question of the construction of the agreement of sale in that case. The majority of the Judges held that, the contract being one of re-conveyance, time would be of the essence, while the minority held that the contract was an ordinary one for conveyance and time not being of the essence, penalties stipulated *in terrorem* could be relieved against. In a case, therefore, where time is made the essence of the contract, or from the nature of the contract if it is found that time should be of the essence of such contract, as in a case of contract for re-conveyance, the default in the performance of the relative obligation by one of the parties to the agreement would constitute failure to perform the condition precedent, and would entail forfeiture of his right which a Court would not be competent to relieve against. If, on the other hand, time is not of the essence, the contract being only for sale of immoveable property, any stipulation therein, prescribing that failure to comply with a term within a time would entail a forfeiture of the rights under the agreement, would amount to forfeiture for non-performance of a non-essential term, and could be relieved against by the Court.

In the present case, the contract is not one for re-conveyance. The original sale was made to Kuppuswami. It was only a few months thereafter Kuppuswami sold to the appellant, who it was that entered into an agreement for sale with respondents 1 and 2, the original vendors. There is, therefore, a disassociation between the original sale, under which respondents 1 and 2 parted with their title to the properties, and the subsequent agreement for sale with the appellant. It cannot be held that the sale by respondents 1 and 2 and the agreement of sale in their favour were parts of the same transaction, as so to make the agreement for sale one of re-purchase merely, conferring a privilege on respondents 1 and 2. In our opinion, Exhibit A-1 is an independent contract for sale of the properties. There is no indication in the contract that time was its essence. Indeed the agreement providing a term of 7 years for the completion of the contract cannot *prima facie* be held to be one where time was considered as the essence. Therefore, non-performance of one of its terms, namely, the regular payment of rent in respect of the collateral transaction of the lease, would not amount to a breach of any essential term of the agreement for sale.

The learned advocate for the appellant referred to certain English cases where strict compliance of the terms and conditions of contract were insisted on. In the view we are taking of the case, we consider it unnecessary to either refer or discuss them. We agree with Krishnaswami Nayudu, J., that default in the punctual payment of rent under the lease-deed which was stipulated to entail forfeiture of the rights under Exhibit A-1 should be relieved against.

This appeal fails, and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Rajagopalan and Mr. Justice Ramachandra Iyer.

V. Venkataraman .. *Applicant**

v.

The Controller of Estate Duty, Madras .. *Respondent.*

Constitution of India, (1950), Article 252 and Estate Duty Act (XXXIV of 1953), section 5 (2)—Scope—Death of a person prior to the publication of notification under section 5 (2)—Estate duty on agricultural lands—Not leviable—Reference under section 64 (1) of the Act.

The power to legislate with respect to estate duty on agricultural lands is vested in the Legislature of the State where the property is situate. But Article 252 of the Constitution makes provision whereby Parliament can make laws in certain circumstances in regard to subjects exclusively within the legislative competence of the State. To entitle Parliament to so legislate the Legislatures of more than

*Tax Case No. 17 of 1958. (Reference No. 8 of 1958).

17th November, 1959. (26th Kartika, 1881—Saka).

one State should be of opinion that Parliament should legislate on the subject for these States and they should pass a resolution to that effect. It would be open to the other States to adopt that legislation by merely passing a resolution in their Legislatures.

A Central legislation adopted by a State under Article 252 of the Constitution cannot have application to that State retrospectively from a date earlier than the date of the resolution of the concerned State Legislature adopting it ; its operation in the State would further depend on the terms of the enactment adopted. If under the terms of an enactment so adopted the State is brought within its ambit only from a particular date (*e.g.*, date of publication of notification under section 5 (2) of the Act), the Central Act adopted would have operation only from that date with respect to the State so adopting.

There is nothing in the Act to make the operation of the Act retrospective either by express words or necessary implication to a date earlier than the date of the publication of the notification under section 5 (2) : It must follow that the duty will be leviable in regard to the agricultural lands of a deceased only in case of his death after the publication of the notification by the Central Government under section 5 (2), that is 11th June, 1955.

Zamorin of Calicut v. *Estate Duty Controller*, (1957) 2 M.L.J. 226, referred.

Case referred to the High Court by the Central Board of Revenue, New Delhi, under section 64 (1) of the Estate Duty Act, 1953 (Act XXXIV of 1953) in R.A. No. Mad. 13 of 1956-57 on its file for decision on the following question of law :

"Whether on the facts and in the circumstances of the case, estate duty was correctly levied on the agricultural lands situated in the Madras State ?"

T. S. Kuppuswami Ayyar, for Applicant.

C. S. Ramarao Sahib, Special Counsel, for Respondent.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—The following question has been referred under section 64 (1) of the Estates Duy Act, 1953 :—

"Whether on the facts and in the circumstances of the case, estate duty was correctly levied on the agricultural lands situated in the Madras State ".

The facts relating to this reference are as follows : One V. Vaidynatha Ayyar, who owned in his individual capacity agricultural lands in the Madras State, houses and other assets died on 17th April, 1955. The applicant, who is an accountable person within the meaning of section 2 (12-A) of the Estate Duty Act, 1953, submitted the account of the estate left by the deceased to the Assistant Controller of Estate Duty, Madras, who determined the principal value of the estate at Rs. 1,43,990. That sum included a sum of Rs. 67,520 the value of the agricultural lands owned by the deceased. The applicant claimed that there could be no levy of estate duty on the value of the agricultural lands, and that he was entitled to a rebate of estate duty on the value thereof from out of the duty fixed for the value of the entire estate. This claim was made on the basis of certain facts which may now be referred to. The Estate Duty Act, 1953, which for the sake of brevity will hereafter be referred to as the Act, came into force on 15th October, 1953. The Act levied a duty on the value of the property constituting the estate of a deceased person. A distinction was, however, made in the Act between agricultural land and other property. In the computation of the value of the estate for the levy of the duty, the value of the agricultural lands situate within a State could be included only if that State was mentioned in the Schedule I to the Act. Under the provisions of the Act as enacted, Madras was not one of the States mentioned in the First Schedule ; the result was that under the provisions of the Act in its original form, there could be no levy of estate duty on the value of agricultural lands situate in that State. But the Constitution and the Act provided for the States which had not been included, to come into Schedule I. On 2nd April, 1955, the Madras State Legislature passed a resolution, adopting the Estate Duty Act in respect of agricultural lands in that State. The Central Government issued a notification in accordance with section 5 (2) of the Act which had the effect of adding Madras State to the First Schedule thereto. The notification was published in the *Gazette of India* on 11th June, 1955.

The case for the applicant is that, as the inheritance to the estate of the deceased had opened before the date of the publication of the notification, when alone the

provisions of that Estate Duty Act became operative with respect to the agricultural lands, no duty would be payable in respect of them. The Assistant Controller of Estate Duty, Madras, overruled the claim for exemption of duty in regard to the agricultural lands. That view was upheld by the Central Board of Revenue. That authority, however, has referred the matter for the opinion of the Court under section 64 (1) of the Estate Duty Act.

The only question for consideration is whether the estate duty can be levied on the agricultural lands owned by the deceased in the State of Madras, death having taken place prior to the publication of the notification under section 5 (2).

The Act enables the levy of a duty in the case of death of a person owning properties upon the value of the estate as a whole. The duty prescribed by the Act is a graduated on levied *ad valorem* and imposed on the principal value of the aggregate estate which passed on the death of a person, the nett principal value being the total value of all the items (subject to certain exceptions and allowances) owned by the deceased after deducting the encumbrances thereon and the debts (if any) due by the deceased, after making a reasonable provision for the funeral expenses. Section 5 which imposes the charge runs :—

" 5. *Levy of estate duty.*—(1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied, and paid upon the principal value ascertained as hereinafter provided of all property, settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called " estate duty " at the rates fixed in accordance with section 35.

(2) The Central Government may, by notification in the Official Gazette, add to the names of any other States to the First Schedule in respect whereof resolutions have been passed by the Legislatures of those States adopting this Act under clause (1) of Article 252 of the Constitution in respect of estate duty on agricultural lands situate in those States, and on the issue of any such notification the States so added shall be deemed to be States specified in the First Schedule within the meaning of sub-section (1) ".

The power to legislate for the purpose of levying the estate duty is given under the Constitution to the Union and State Legislatures with reference to the subjects which are within their respective legislative competence. Article 366 (9) of the Constitution defines " estate duty " thus :

"'estate duty' means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass ".

Item 87 of List I of the Seventh Schedule to the Constitution runs :

" Estate duty in respect of property other than agricultural land ".

Item 48, List II of the Seventh Schedule states :

" Estate duty in respect of agricultural land ".

Under Article 246 of the Constitution, the Parliament would have exclusive power to make laws with respect to the matters enumerated in List I of the Seventh Schedule. Therefore, Parliament would have power to legislate in regard to estate duty only in respect of a property other than agricultural land. If, therefore, Parliament enacts a statute imposing duties on the estate of a deceased person, the enactment would charge or reach only those properties which was within its competence to legislate, and this would be so even if the Statute used expressions wide enough to include other properties over which it was not competent to legislate : Vide *Blackwood* v. *Queen*[1]. The power to legislate with respect to estate duty on agricultural lands, to which inheritance opened on the death of a person, is vested in the Legislature of the State where the property is situate. Such a power cannot be delegated in the absence of a constitutional provision to the Parliament. In In re *the Delhi Laws Act*, 1912[2], Mahajan, J., (as he then was) observed at page 941 :—

1. (1882) L.R. 8 A.C. 82. 2. (1951) S.C.J. 527 : 1951 S.C.R. 747.

"It is implicit in the demarcation of legislative subjects that one Legislature cannot, by delegation of subjects that are exclusively within its fold, clothe the other with legislative capacity to make laws on the subject, as it will amount to an infringement of the Constitution itself".

The Constitution, however, provides an exception to the Rule in Article 252 which declares :

"252. (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in Articles 249 and 250 should be regulated in such States the Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State".

In considering Article 252, Mahajan, J., stated in In re *Delhi Laws Act*[1], at page 944:

"Article 252 is a somewhat peculiar provision. Under it Parliament can legislate for two or more States with their consent. This is a form of exercise of legislative power by Parliament as a delegate of the State as by its consent alone Parliament gets the power of legislation."

The Article envisages the enactment of uniform State legislation upon subjects over which the States have exclusive powers in relation thereto. Such uniformity would be very necessary when in regard to a particular subject like estate duty both the Parliament and the States have powers to legislate over distinct portions of an estate. Thus, notwithstanding the provisions of Article 246, Article 252 would render it possible for the Parliament in certain circumstances to make law in regard to subjects exclusively within the legislative competence of State. To entitle the Parliament to so legislate the Legislatures of more than one State should be of opinion that the Parliament should legislate on the subject for these States, and pass a resolution to that effect. The law thus made by Parliament would govern those States which had previously agreed to it. It would be open to other States to adopt that legislation, and this they could do by merely passing a resolution in their Legislatures. The pattern of legislation ordinarily takes one of the two forms : (1) it may be a self-contained enactment, the familiar type of legislation, and (2) it may adopt an enactment of any other Legislature by incorporating the provisions thereof to its own enactments. Examples of the type are : The Hindu Woman's Right to Property Act, 1937 and the Musalman Law Personal (Shariat) Application Act, 1937, which were enacted by the Central Legislature. The Provincial Legislatures adopted those enactments subsequently with respect to agricultural lands. But in the case of such Acts the State Legislatures passed their own enactments adopting the procedure prescribed by Article 196 *et seq* of the Constitution. The adoption of a Central enactment by a State Legislature under Article 252 is of a different type in that a mere resolution of the Legislature of the State would make the Central Act applicable to that State.

In the case of a legislation by the State itself, its terms would be as enacted by it ; in the case of one adopted under Article 252 the legislation would be in terms of what was enacted by the Parliament. In the former case it would be open to the Legislature to enact a retrospective legislation : for instance if the State Legislature itself were to enact Estate Duty Legislation with respect to agricultural lands situate within it, it can levy a duty retrospectively. In *Bappu Iyer* v. *Ranganayaki*[2], a question arose as to the retrospective operation of the Madras Act, XXVI of 1947, which extended the Central Act (Hindu Woman's Right to Property Act, 1937) to agricultural lands in the State. It was held that the Act was a declaratory one, and that in absence of the saving clause which limited the retrospective operation it would have operated from the time when the Central Act began to operate. But that principle would not apply if the State Legislature were to adopt a Central Act under Article 252. The provision in the Constitution merely enables the adoption

1. (1951) S.C.J. 527 : 1951 S.C.R. 747. 2. (1955) 2 M.L.J. 302.

of the Central Act, and not any addition to or subtraction therefrom. The retrospective operation consequent on the adoption of a Central Act would therefore depend on two factors : (1) the provisions of Article 252 and (2) the provisions of the Central Act which had been adopted.

On the terms of Article 252, the Central Act, if adopted by a State Legislature could, at the earliest, operate only from the date of the resolution of the State Legislature. The language employed is consistent only with a prospective operation of the statute. That apart, there being no constitutional power in the Parliament to legislate with respect to a subject, exclusively within legislative competence of a State Legislature, it must be held that the statute could operate only after such power is acquired by means of the resolution of the concerned State Legislature. In *Zamorin of Calicut* v. *The Estate Duty Controller*[1], a Bench of this Court, to which one of us was a party, held that no estate duty would be leviable on agricultural lands in the Madras State, the owner of which died prior to the date of the resolution of the State Legislature, that is, on 2nd April, 1955.

Article 252 of the Constitution is an enabling one : while it prescribes the period from which an adopted Legislation could operate, it does not interfere with the power of the Parliament to enact as to from when it should thereafter operate. To put in other words it would be open to the Parliament to enact that the Act should apply from a later date than the date of passing of the resolution. This is what Parliament did in enacting section 5 of the Estate Duty Act. Section 5 (1) which is the charging provision authorises the levy of a duty on agricultural lands situate in the States mentioned in Schedule I to the Act. For the charging provision under section 5 (1) to apply, the State in which the agricultural lands are situate should be brought within that Schedule. Section 5 (2) provides for cases of States not entered in Schedule I, that is, those States which subsequently adopt the Estate Duty Act with respect to the agricultural lands in them on passing a resolution under Article 252. A State which is not in Schedule I could be deemed to be included in it only by the operation of section 5 (2). That section creates a fiction, under which the adopting state is deemed to have been included in the Schedule on a notification being published by the Central Government. It would follow that section 5 (1) would apply only after the date of the publication of the notification and not immediately on the date of the resolution by the State Legislature. The matter can be viewed in another way as well. When the Madras Legislature adopted the Estate Duty Act, 1953, with reference to the agricultural lands within it, it adopted it with all its provisions ; that it so say, that the Madras State should be deemed to be included in the First Schedule only on the date of the publication of the notification by the Central Government under section 5 (2), and that the liability to duty would arise only from that date.

Mr. Rama Rao Sahib, the learned counsel for the respondent, contended that the result of the adoption of the Estate Duty Act by the Madras Legislature would normally make it applicable to the agricultural lands in the State as and from the date of the Act : but that as the Central Legislature had no power to legislate with respect to the agricultural lands in a State till the resolution of the State Legislature adopting it, the retrospective operation beyond that date would fail, and subject to that there would be retrospective operation. The true rule, according to the learned counsel, is that the adoption of a Central Act by a State Legislature should be held to be declaratory of the law of the State, which would mean that the Central Act would apply to the adopting State as from the date it came into force. The learned counsel contended that that principle was recognised by section 5 (2) of the Act which created a fiction, emphasising the fact that but for the fiction the Act would operate from 15th October, 1953. That fiction could have no effect in the operation of the Act from the date of the Resolution which is permissible under the Constitution. He relied in this connection upon a passage in "Statute Law" by Craies, at page 364, namely :—

1. (1957) 2 M.L.J. 226.

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or, as Parke, J. said in *R.* v. *Dursley*[1], "to 'explain' a former statute", the subsequent statute has relation back to the time when the prior Act was passed. Thus, in *Attorney-General* v. *Pougett*[2], it appeared that by 53 Geo. 3, C. 33, a duty was imposed upon hides of 9 *s.* 4 *d.*, but the Act omitted to state that it was to be 9 *s.* 4 *d.* per cwt., and to remedy this omission 53 Geo., C. 105 was passed. Between the passing of these two Acts some hides were exported and it was contended that they were not liable to pay the duty of 9 *s.* 4 *d.* per cwt., but Thompson, C.B., in giving judgment for the Attorney-General, said : "The duty in the instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it was passed, and they must be taken together as if they were one and the same Act"."

That principle is only an illustration of the rule, that declaratory and remedial legislations are generaly retrospective. *Vide* also Maxwell, 10th edition, page 222. As observed in Crawford's "Statutory Construction", Article 74 :

"they (declaratory enactments) resemble interpretation clauses, and their paramount purpose is to remove doubt as to the meaning of existing law, or to correct a construction considered erroneous by the Legislature".

The adoption of the Estate Duty Act by the Madras State Legislature cannot amount to a mere declaratory enactment or one to supply an obvious omission in that Act. The question of omission would arise only when the Legislature passing the main Act makes an omission, which it is competent to rectify : in such a case the principle is that the rectification is deemed to have been made as from the date of the main enactment. But that principle would have no application where the omission is the result of lack of legislative competence. The power to legislate with respect to the estate duty in respect of agricultural lands is with the State Legislature, and when that Legislature exercises that power in whatever manner it might be, in would be a new Legislation and not supplying the omission in a previous Central Legislation. In exercising its power, the statute will be the one imposing a financial burden or tax on the subject, and that could *prima facie* have only prospective operation.

The Estate Duty Act, on its terms, would only have a prospective operation. The effect of the notification under section 5 (2) is to amend Schedule I by including therein the name of the State. The question to be considered then is, as to when a statute on its terms having prospective operation would apply to a subject brought within its provisions as a result of an amendment thereto. The rule of construction in such a case is stated in Crawford's Statutory Construction (1940), at page 597, Article 295 :

"As with statutes generally, an amendment will have no retrospective operation, unless its form clearly indicates a different intention. There is also a presumption that amendments are effective prospectively. Consequently, rights acquired under a statute before its amendment are not affected, unless the amending statute, expressly or by necessary implication so provides. But if the legislative intent requires it, retroactive operation must be given to the amendment".

In Article 306, at page 622, it is stated :

"Amendatory statutes are subject to the general principles discussed elsewhere herein relative to retroactive operation. Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed, there is a presumption that an amendment shall operate prospectively".

To sum up, a Central Legislation adopted by a State under Article 252 of the Constitution cannot have application to that State retrospectively from a date earlier than the date of the resolution of the concerned State Legislature adopting it ; its operation in that State would further depend on the terms of the enactment adopted. If under the terms of an enactment so adopted the State is brought within its ambit only from a particular date (*e.g.*, date of publication of notification under section 5 (2) of the Act), the Central Act adopted would have operation only from that date with respect to the State so adopting.

1. (1832) 3 B. & Ad. 465, 469 : 110 E.R. 168. 2. (1816) 2 Price 381, 392 : 146 E.R. 130.

There is nothing in the Act to make the operation of the Act retrospective either by express words or necessary implication to a date earlier than the date of the publication of the notification under section 5 (2) : it must follow that the duty will be leviable in regard to the agricultural lands of a deceased only in case of his death after the publication of the notification by the Central Government under section 5 (2), that is, 11th June, 1955.

In the present case, the deceased died in April, 1955, sometime prior to the coming into force of the Estate Duty Act in respect of the agricultural lands in the Madras State : the applicant would be entitled to a rebate of duty with respect to the value of the agricultural lands situate in the Madras State. The question referred to us is answered in the negative. The applicant will be entitled to his cost. Counsel's fee. Rs. 250.

V.S. *Reference answered in favour of assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Visalakshi Ammal .. *Appellant**

v.

Kuppammal and others .. *Respondents.*

Decree—Construction—Allotment of properties under partition decree to Hindu females—Nature of interest —Whether limited or absolute.

Where a decree merely stated that each one of the parties (plaintiff and defendants 1 to 4) shall take one-fifth share of the properties, and there are no words of limitation under the decree, there is no reason to presume that what was allotted under the terms of the decree was intended to convey only a limited interest simply because the person who happens to get a share is a woman. On the other hand the ordinary presumption that the persons who got the property under the terms of the decree got it absolutely must prevail.

Case-law discussed.

Appeal against the Decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 39 of 1956 preferred against the Decree of the Court of the District Munsif of Periakulam in Original Suit No. 126 of 1954.

J. R. Alwar Naidu and *Srimathi B. Krishnaveni*, for Appellant.

T. P. Gopalakrishnan, for Respondent.

The Judgment of the Court was delivered by

Somasundaram, J.—This Second Appeal relates to the construction of the terms of the decree passed in A.S. Nos. 128 and 133 of 1947, on the file of the Subordinate Judge's Court, Dindigul. The material portion for the purposes of the construction of the terms of the decree is as follows :—

"That the plaintiff and defendants 1 to 4 are each entitled to an one-fifth share in items, 1, 2 and 4 of the plaint schedule copied hereunder".

"That the said items 1, 2 and 4 be each divided into five equal shares and the plaintiff allotted one such share in each of the said items 1, 2 and 4".

The question is whether the one-fifth share allotted to each one of the parties is to be interpreted as the absolute property of that person or whether it should be construed as a woman's estate, the plaintiff and defendants 1 to 3 being women.

The facts of the case out of which this Second Appeal arises may briefly be stated as follows :—

Plaintiff and defendants 2, 3 and the mother of the 4th defendant are the daughters of one Narayanaswami Chettiar whose widow is the first defendant. The

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*Second Appeal No. 49 of 1958. 8th December, 1959. (17th Agrahayana, 1881—Saka).

said Narayanaswami executed a settlement deed, dated 17th April, 1934, in respect of the plaint schedule properties. Under the terms of that settlement deed his wife was to take the properties after his lifetime. The wife was given a life estate in the properties after the death of her husband. Thereafter their issues, namely, the plaintiff and defendants 2, 3 and the mother of defendant 4 are to get those properties with absolute rights in equal shares. After the execution of this settlement deed Narayanaswami executed another deed, Exhibit B-3 purporting to cancel the settlement deed, dated 17th April, 1934. Exhibit B-3 is dated 19th March, 1936. Subsequent to 19th March, 1936 deed the mother purporting to act on her own behalf and on behalf of her minor daughters executed a release deed in favour of her husband (Exhibit B-4, dated 19th August, 1936). Narayanaswami died on 28th May, 1942. The plaintiff who had been married by this time filed O.S. No. 367 of 1946 on the file of the District Munsif's Court, Periakulam, for partition and separate possession of her share in the properties mentioned in the settlement deed. The suit was decreed in her favour. It may be mentioned here that the decree had been passed notwithstanding the fact that at the time when the plaintiff filed the suit for partition she was not entitled to any share under the settlement deed because she would be entitled to get the properties only after the death of her mother and at the time of the suit the mother was alive and she is still alive. Nevertheless she obtained a decree for partition and under the final decree she got one acre and 27½ cents of nanja lands in S.No. 82/3 of Vadagarai village and also Rs. 500 in cash. There was thus left 4/5ths share in the properties of Narayanaswami. After this decree was passed defendants 1 to 4 executed a sale-deed, dated 4th August, 1954, (Exhibit B-1) in favour of the 5th defendant in respect of the plaint A schedule properties and they sold the trees that stood on the southern portion of the plaint A schedule properties to the 6th defendant. This suit out of which the present Second Appeal arises was filed for a declaration that the said sale-deed was void and was not binding on the plaintiff. In the written statement filed by the first defendant she stated that she executed the sale-deed for adequate consideration for purposes of necessity and that she only sold the withered trees to the 6th defendant and that the sale proceeds thereof were utilised for family expenses. The other defendants adopted the written statement of the first defendant.

The question that came up for determination was whether the plaintiff was entitled to a declaration and injunction as prayed for and whether she has any cause of action. This question depends upon the construction of the terms of the decree passed in A.S. Nos. 128 and 133 of 1947 (O.S. No. 367 of 1946). As already stated the decrees merely stated that each one of the parties shall take one-fifth share. There were no words of limitation under the terms of the decree.

The contention of the plaintiff is that this being a division of the properties among the women the share allotted to each takes the character of limited estates and therefore the share that was allotted to each of the defendants in O.S. No. 367 of 1946 must be construed to mean and would convey only a limited interest and therefore any alienation made by her mother was not binding on the plaintiff.

The first Court held in favour of the plaintiff and on appeal the appellate Court dismissed the suit of the plaintiff holding that the widow, that is, the first defendant had got absolute title to the properties and that she had alienated them for purposes of necessity.

The only question argued before me is whether the decree gives absolute rights to each of the parties or whether it is to be construed as conferring women's estate only.

The question, therefore, for decision turns upon the construction of the terms of the decree as to whether the share that each one of the defendants got under the decree was absolute property or the defendants got only a limited estate.

Mr. Alwar Naidu appearing for the appellant contends that the properties given to each one of the parties under the terms of the decree take the character of a women's estate as the property which the plaintiff got under an earlier suit was

under the terms of a decree in a suit filed for partition and separate possession against her mother and sisters and as in a partition in a Hindu family the woman got only a limited interest the plaintiff must be considered to have taken the same kind of interest under the decree. In support of this contention learned counsel for the appellant relied on *Kamala Devi* v. *Bachulal Gupta*[1], *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2], *Nathu Lal* v. *Babu Ram*[3], *Appasami Pillai* v. *Thayammal*[4]. In *Kamala Devi* v. *Bachulal Gupta*[1], the terms of the preliminary decree are set out thus:—

> " The Commissioner is further directed to allot as little liquid cash to the share of plaintiff No. 2 (Sumitra Devi) as possible on partition and as a rule should allot such properties to her share of which she may receive income without trouble, but may not prejudice the reversioners by destroying the corpus."

Their Lordships of the Supreme Court held :

> " It follows, therefore, that under the Mitakshara law and also under the partition decree, Smt. Sumitra Devi did not have an absolute right or interest in the share allotted to her on partition ".

It is quite clear from the terms of the decree, namely " but may not prejudice the reversioners by destroying the corpus" that what was given to Smt. Sumitra Devi under the decree was only a limited estate. In the above case the question was decided on the terms of the preliminary decree for partition which clearly showed that the lady got only a limited estate. In *Devi Mangal Prasad* v. *Mahadeo Prasad*[2], their Lordships of the Privy Council stated the law as follows, at p. 242 :—

> " The question now arises whether there is any substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It is a question attended with some difficulties, especially in the construction of the Mitaskshara Law, whatever view of it may be taken. While a family remains joint, a woman has no right under the Mitakshara for a specific share of the family estate. She is only entitled to maintenance or in due course to her customary inheritance and if a partition takes place a mother gets a share equal to that of a son. If the share allotted to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance then according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance it seems equally reasonable that when the necessity for her maintenance has ceased, the property should revert to the estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift as part of her stridhan, so as to constitute a provision for her stridhan heirs ; but in the absence of any such intention their Lordships do not feel justified in putting property acquired by a widow on a partition of the joint estate, upon a footing different from that on which the property coming to her by way of inheritance has been placed."

In the above case the mother got certain items at a partition of the joint family properties. As pointed out by their Lordships of the Privy Council in joint family property the woman is entitled only to maintenance and in lieu of maintenance she may be allotted some properties. It is obvious, therefore, that on the principles laid down the woman got only a limited interest in the properties allotted to her. In my opinion this case does not help the plaintiff's contention in the present case. The next decision relied on by the learned counsel for the appellant is *Nathulal* v. *Babu Ram*[3]. The facts of the case are as follows :—

When one Ji Sukh Ram died in 1891 he was a member of a joint Hindu family on which he and his elder brother Ram Sahai were members. Ram Sahai had a son called Shiam Lal but on the death of Ji Sukh, Shiam Lal who was a minor, alleged that Ji Sukh had adopted him in his lifetime. Mussamat Jumana (wife of Ji Sukh) claimed to be the heir of her husband. Ram Sahai claimed that he being joint with Ji Sukh the whole of the property of Ji Sukh passed by survivorship and that his widow took nothing by inheritance. In these circumstances, a dispute arose before the revenue authorities and was being taken on appeal to the Collector, the question being whether Ram Sahai, Shiam Lal or Mussamat Jumana was entitled

1. (1957) S.C.J. 321 : (1957) 1 An.W.R. (S.C.) 66 : (1957) 1 M.L.J. (S.C.) 66 : 1957 S.C.R. 452 : A.I.R. 1957 S.C. 434.
2. (1912) 22 M.L.J. 462 : L.R. 39 I.A. 121 : 34 All. 234.
3. (1935) 38 B.L.R. 462(P.C.).
4. (1939) 2 M.L.J. 236.

to be recorded as proprietor. Mussamat Jumana contended that a partition was necessary in order to put her in possession of her husband's share as representing her husband's estate. These disputes between Ram Sahai and Mussamat Jumana were referred to arbitration. The arbitrators gave Mussamat Jumana certain lands and also a portion of the dwelling house. There were no words of limitation in respect of this allotment. Their Lordships observe at page 468 :

"Their Lordships consider that the absolute title of Mussamat Jumana is established and that the learned Judges of the High Court were wrong in thinking that because her claim before the arbitrators was originally a claim by a Hindu woman to take he husband's estate by inheritance the estate which she in fact obtained under the award was confined to a limited estate. By the bargain which she drove the reversioners of her husband were not damnified. She did not bind them or represent them and she was not their agent or trustee to acquire property for her husband's estate ".

In short they held that the plain words amounted to her getting an absolute interest in the properties. This decision, in my opinion, is more in favour of the respondents than in favour of the appellant. The next decision cited in support of the appellant's case is *Appasami Pillai* v. *Thayammal*[1], where a Division Bench of this Court has held that the parties by a compromise or surrender cannot convert a limited estate into an absolute one. In my opinion the facts of the case are quite different from those of the present case and therefore the decision would not apply to the case of the plaintiff.

On behalf of the respondents the learned counsel Mr. Gopalakrishnan contends that in the absence of any express words of limitation the terms of the decree must be understood in the ordinary sense, that is to say, as conveying absolute rights in the properties allotted, and that it should make no difference whatsoever whether the estate is granted to a man or woman. He also points out that at the time when the plaintiff filed the suit for partition she was not entitled to any share in the properties and that if she had been given a share in the properties it must be only on the understanding that each one of the parties got an absolute estate. There is no evidence as regards this understanding but the learned counsel contends that it must be inferred from the circumstances of the case. That is, it is only on that understanding that the mother who is entitled to the entire properties must have consented to a share being allotted to the plaintiff as normally the plaintiff is not entitled to claim any right during the lifetime of her mother.

The decision on which learned counsel for the respondents relied are *Ramachandra Rao* v. *Ramachandra Rao*[2], *Krishnaswami Ayya* v. *Ramachandra Rao*[3], *Ram Gopal* v. *Nand Lal*[4], which is followed in *Nathoo Lal* v. *Durga Prasad*[5]. In *Ramachandra Rao* v. *Ramachandra Rao*[2], which is a Bench decision of this Court there was a gift under a will by the testator to his two wives. The words used in the will were :

" Out of the remaining half of the property these two persons, namely, my senior wife (S.K.) and junior wife (S.T.B.) shall take half and half."

What exactly was the nature of the estate taken by the two wives came up for consideration and the bench consisting of Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar held as follows :

" Unless a grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent of the interest conveyed, a grant to a Hindu female conveys an absolute estate and there is no presumption of law to the contrary at least in this presidency ".

This clearly shows that unless there are words which expressly curtail the nature of the interest it must be taken to mean that it was the absolute interest that was conveyed, and not a limited interest as contended for the plaintiff in the present case, *Krishnaswami Ayya* v. *Ramachandra Rao*[3], which followed *Ramachandra Rao* v. *Ramachandra Rao*[2], is also a decision by a bench of this Court consisting of Ramesam and Cornish, JJ. The same came up again for consideration after going to the Privy Council. The learned Judges held :—

1. (1939) 2 M.L.J. 236.
2. (1918) 36 M.L.J. 306 : I.L.R. 42 Mad. 283.
3. (1934) 67 M.L.J. 821.
4. 1950 S.C.R. 766 : 1950 S.C.J. 575.
5. 1954 S.C.J. 557 : (1955) 1 S.C.R. 51.

"There is no material difference between the terms of the devise to the adopted son (which are undoubtedly sufficient to carry an absolute estate) and the terms in which the devise to the widows is expressed, served to show that the testator intended to make no distinction in the quality of the estate given in either case".

Their Lordships came to the conclusion that the widows took their portion as absolute owners. *Ram Lal Gopal* v. *Nand Lal*[1], is a case where the terms of a deed of transfer came for consideration. There was a transfer of some items of properties in favour of a widow who had surrendered her interests in favour of the nearest reversioner, for her maintenance in lieu of her relinquishment. In the deed of transfer there were no words of limitation. Their Lordships of the Supreme Court held that to convey an absolute estate to a Hindu female, no express power of alienation need be given. It is enough if words are used of such amplitude as would convey full rights of ownership. They further held : The mere fact that the grant was made for the maintenance and residence of the widow could not be taken to be a *prima facie* indication of the intention of the executant that the widow was to enjoy the property only during her lifetime. The object of creating the relinquishment deed and the tamliknama contemporaneously was not merely to make provision for the maintenance of the widow ; the other and the more important object was to perfect the title of the minor to the estate and to quiet all disputes that might arise in respect of the same.

" . . . . . . There is nothing in the context of the document or in the surrounding circumstances which would displace the presumption of full proprietary rights which the use of the word " Malik " is apt ordinarily to convey. The widow got an absolute title to the properties on the strength of the tamliknama ".

This decision is referred to with approval in *Nathoo Lal* v. *Durga Prasad*[2]. In this case their Lordships stated the law as follows :—

"According to law as understood at present where there are no express terms in a deed of gift by a donor having absolute rights there is no presumption one way or the other and there is no difference in the case of a male and the case of a female and the fact that the donee is a woman does not make the gift any the less absolute where the words would be sufficient to convey an absolute estate to a male. To convey an absolute estate to a Hindu female, no express power of alienation need be given ; it is enough if words are used of such amplitude as would convey full rights of ownership. It is clearly wrong to say that a will having been made by the father in favour of his daughter, it should be presumed that he intended to give her a limited life estate ."

The above observations of their Lordships of the Supreme Court clearly establish, in my opinion, the rule that where there are no words of limitation the ordinary presumption is that the estate that is given is an absolute one. What the plaintiff got is not even a gift. It was under the terms of the decree that a share was allotted to the plaintiff and the other members of the family. There is no reason to presume that what was allotted to each one of the parties under the terms of the decree was intended to convey only a limited interest simply because the person who gets the share happens to be a female. On the other hand the ordinary presumption tion that the persons who got the property under the terms of the decree got it absolutely must prevail.

In the circumstances of the case I hold that what was given to each party under the decree conveyed an absolute interest. The lower appellate Court was, therefore, justified in dismissing the suit of the plaintiff. The Second Appeal is dismissed with costs. In view of the fact that the decision turns upon the construction of the words used in the decree I grant leave to the appellant.

V.S. *Second Appeal dismissed.*

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1. 1950 S.C.R. 766 : 1950 S.C.J. 575. 2. (1954) S.C.J. 557 : (1955) 1 S.C.R. 51.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Southern Transports, Periakulam, by B. V. Ramachandra Naidu .. *Appellant**

v.

Kodaikanal Motor Union, Madurai, and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 44 (3) (c)—*Order directing variation of route' by Transport' Commissioner—Administrative Order outside the purview of correction by* certiorari—*Application for variation made to the R.T.A. in pursuance of the order of Transport Commissioner—Writ of prohibition—Not maintainable—Constitution of India* (1950), *Article* 226—*Scope.*

Where in pursuance of an order of the Transport Commissioner under section 44 (3) (*c*) of the Motor Vehicles Act, an application for variation of the route is made to the Regional Transport Authority which is the proper authority having jurisdiction to deal with the matter a writ of prohibition will not lie.

An order passed by the Transport Commissioner under section 44 (3) (*c*) of the Act directing variation of a route is an administrative one and could not be challenged by a petition for *certiorari* under Article 266 of the Constitution.

If the order of the Transport Commissioner cannot be got rid of directly by a writ under Article 226, the same thing cannot be done indirectly by obtaining an order of prohibition restraining the Road Transport Authority and from dealing with the application for variation.

Raman and Raman, Ltd. v. *State of Madras,* (1957) 2 M.L.J. 76, referred.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Balakrishna Ayyar, dated 24th August, 1959 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 946 of 1958 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* to call for the records in Notification No. 11261-A/2-58, dated 30th September, 1958, on the file of the Regional Transport Authority, Ramanathapuram at Madurai, and to issue a writ of prohibition directing Respondents 2 to 4 to forbear from proceeding further in the matter of granting the variation to the first Respondent in regard to his Bus MDM 6458, operating on the route Madurai to Tirupattur as Madurai to Thirumayam.

G. R. Jagadisan, for Appellant.

R. M. Seshadri, for 1st Respondent.

The Additional Government Pleader (*M. M. Ismail*), for Respondents 2 to 5.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Ayyar, J., in W.P. No. 946 of 1958 filed by the appellant, Messrs. Southern Transports, Periakulam, under Article 226 of the Constitution of India for the issue of a writ of prohibition, directing the Regional Transport Authority, Madurai, the Regional Transport Authority, Tiruchirapalli, and the Regional Transport Authority of Ramanathapuram at Madurai to forbear from proceeding further in the matter of granting the variation to the first respondent, Kodaikanal Motor Union, Ltd., Madurai, in regard to his bus MDM 6458 operating on the route Madurai to Tirupattur as Madurai to Thirumayam. Balakrishna Ayyar, J., dismissed the petition and hence this appeal.

It is sufficient to mention the following material facts which led up to the filing of the writ petition. In 1956, the Kodaikannal Motor Union applied for a variation of the permit which it already held in respect of one of its buses on the route Madurai

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* W.P. No. 97 of 1959. 17th November, 1959.
(26th Kartika, 1881—Saka).

to Tirupattur, so that it could run right upto Thirumayam in Tiruchirapalli District. The revised route lay over three districts, Madurai, Ramanathpuram and Tiruchirapalli. The three Regional Transport Authorities concerned notified the application and invited objections. The appellant before us was one of the objectors. As there was difference of opinion between the three Regional Transport Authorities as to the necessity and desirability of extension of the route, the application for variation was rejected. However, as there was a difference of opinion on the question, there was a reference to the Transport Commissioner, Madras, under section 44 (3) (*c*) of the Motor Vehicles Act. The Transport Commissioner decided that the route Madurai to Tirupattur might be extended upto Thirumayam in respect of one bus. Subsequently, the first respondent, Kodaikannal Motor Union, filed another application for variation similar to the application made by them earlier. The Regional Transport Authority, Ramanathapuram, notified that the consideration of the application would be taken up on or after 31st October, 1958. It was at that stage that the appellant filed the writ petition, out of which this appeal arises, for the issue of an appropriate writ, prohibiting the three Regional Transport Authorities mentioned above from proceeding further in dealing with the application for variation. The ground on which the writ petition was founded was that the Transport Commissioner failed to observe the fundamental principle of natural justice in deciding in favour of the extension without giving notice to the appellant who had been interested in opposing the variation. It is obvious, therefore, that substantially what the appellant was seeking to attack was the decision of the Transport Commissioner. It was conceded that the application for variation was properly made to the proper authorities. It is also beyond dispute that these were the authorities who had jurisdiction to deal with the application for variation. A writ of prohibition can issue to an inferior tribunal only when it is proceeding with a matter which is beyond the jurisdiction of that Tribunal. In this case, it cannot be said that any of the three Regional Transport Authorities was proceeding to deal with an application which they had no jurisdiction to deal with. The appellant will, therefore, not be entitled to invoke the provisions of Article 226 of the Constitution and obtain any relief.

As mentioned above, it is obvious that what the appellant is really challenging is the validity of the decision of the Transport Commissioner. It was held by Rajagopalan, J., in *Raman and Raman Ltd* v. *State of Madras*[1], that a direction given by the Government under section 43-A (2) of the Motor Vehicles Act was an administrative order outside the purview of correction by a writ of *certiorari*. The learned Judge further held that no writ of prohibition could issue to the Regional Transport Authority to provide for any anticipated breach of its lawful obligations arising out of the directions of the Government under section 43-A (2). An order passed by the Government under section 43-A (2) and an order passed by the Transport Commissioner under section 44 (3) (*c*) are similar in their nature. Following, with respect the decision of the learned Judge, we hold that the order of the Transport Commissioner, being an administrative order, could not be challenged in a petition under Article 226 of the Constitution, either for *certiorari* or for prohibition. It is well established that what cannot be done directly cannot be permitted to be done indirectly. If the appellant cannot get rid of the order of the Transport Commissioner directly by a writ issued under Article 226, he cannot virtually obtain that re-relief indirectly by obtaining an order of prohibition, restraining the Regional Transport Authorities from dealing with the application for variation.

In this view, it is not necessary to deal with the question whether the Transport Commissioner was bound to give notice to a person in the position of the appellant before he decided any matter on which there was difference of opinion between several Regional Transport Authorities, and whether failure to give such notice would be a contravention of rules of natural justice.

The appeal fails and is dismissed. There will be no order as to costs.

V.S. —— *Appeal dismissed.*

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1. (1957) 2 M.L.J. 76.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Periaswamy Goundar .. *Petitioner**

v.

Municipal Council, Erode, by Commissioner and another .. *Respondents.*

Madras District Municipalities Act (V of 1925), sections 13-A, 22 and 36—Cumulative effect of—Duty of Commissioner to give effect to every resolution of Council.

Sections 13-A and 22 of the Madras District Municipalities Act taken in conjunction with the specific provisions contained in section 36, leave no room for doubt that the Commissioner of a Municipality (Executive Officer) is not vested with any power to refuse to carry out the resolution of the Council. His opinion regarding the validity of the resolution cannot form any foundation for enabling him to suspend the resolution, and refuse to perform the statutory duty enjoined on him by sections 13-A and 22 of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings relating to issue of licence and permit, dated 25th March, 1958, in pursuance of the Erode Municipality's Resolution No.882, dated 1st March, 1958 and issued in favour of the 2nd Respondent to install a 5 H.P. motor and run 5 powerlooms in Premises No. 55, Muthuvelappa Gounder Street, Erode, and quash the said proceedings.

V. S. Subrahmanyam, for Petitioner.

B. V. Viswanatha Ayyar, K. V. Sankaran and *S. Sethuratnam*, for Respondents.

The Court made the following

ORDER.—These two writ petitions are directed to the Municipal Council of Erode and seek the relief of obtaining cancellation of a licence issued to the second respondent in each of the petitions permitting the latter to work a powerloom in a building adjacent to the residential premises of the petitioner.

A few facts are necessary to be stated to appreciate the points arising for decision. The second respondent, Palaniandavar Textiles, by proprietor, Muthuswami Gounder & Co., applied to the Erode Municipality in or about November, 1956, for the grant of a licence to enable him to install a 5 H.P. motor to work 5 powerlooms in Premises No.55, Muthuvelappa Gounder Street, Erode. This door No. 55 in exactly at the back of the petitioner's residential house, which bore No.58, Borough Road, Erode. By a resolution of the Erode Municipal Council in its proceedings, dated 25h May, 1957, this body decided not to grant the permission on the ground that the same would affect the public health and be a nuisance to the public. The second respondent sought to have this resolution of the Municipal Council cancelled by an application to the Government in revision. But by their order, dated 19th November, 1957, the Government refused to interfere with this resolution. The second respondent, however, still persisted in its attempts to obtain the licence and succeeded, a resolution being passed by the Erode Municipal Council on 27th February, 1958, granting the requisite permission and licence.

Complaining that this resolution of the Municipal Council granting a licence thereunder was beyond the powers of the Municipality the present petitioner moved this Court in W.P. 222 of 1958 for a direction to quash the resolution. The main ground urged in this petition was that 55, Muthuvelappa Goundar Street, where the second respondent had been permitted to install the machinery and work the powerlooms had been notified as a residential area under section 89 (1) of the Madras Public Health Act. Before Writ Petition 222 of 1958 came on for hearing in the

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* W.P. Nos. 830 and 831 of 1958. 14th September, 1959.
(23rd Bhadra 1881—Saka.)

normal course, the Erode Municipal Council held another meeting on 30th June, 1958, at which a resolution cancelling the earlier resolution, dated 27th February, 1958, was passed. Since the petitioner had achieved what he desired to achieve by his writ petition, namely, the cancellation of the resolution of the Council, dated 27th February, 1958, the petition was not pressed, it was withdrawn as having become unnecessary and dismissed. Notwithstanding, however, the cancellation of the resolution, dated 27th February, 1958, by proceedings of 30th June, 1958, the Commissioner of the Erode Municipality still continued to implement the resolution, dated 27th February, 1958, by granting the licence and the permission which the second respondent had sought for the installation of the motors and the working of the looms. The petitioner, through his counsel, addressed a letter to the Commissioner inviting his attention to the resolution, dated 30th June, 1958 and the circumstances in which Writ Petition 222 of 1958 was withdrawn, and requesting him to give effect to the last resolution of the Council, dated 30th June, 1958, by which the earlier resolution, dated 27th February, 1958, had been cancelled. By his reply, dated 14th August, 1958, the Commissioner pointed out that the resolution, dated 30th June, 1958, was not in accordance with law and that in the circumstances he could not give effect to it, but had been awaiting the orders of Government to whom the matter had been referred. It is in these circumstances that these two Writ Petitions have been filed. The relief prayed for in W.P. 831 of 1958 is in the nature of a writ of *mandamus* to the Commissioner of the Municipality to give effect to and implement the resolution, dated 30th June, 1958, by which the earlier resolution, dated 27th February, 1958, had been cancelled, while the relief sought in W.P. 830 of 1958 is practically a repetition of that sought in W.P. 222 of 1958, namely, to direct the cancellation of the resolution of the Municipal Council, dated 27th February, 1958.

I shall first take for consideration W.P. 830 of 1958 because if the petitioner succeeds in it, the validity of the resolution of the Municipal Council, dated 30th June, 1958, becomes immaterial. The foundation of W.P. 830 of 1958 is that the Municipality had no jurisdiction to grant permission to the second respondent to install machinery and work the powerlooms in No. 55, Muthuvelappa Gounder Street, because that was an area, which had been notified as a residential area under section 89 (1) of the Madras Public Health Act. I have examined the relative notification issued under the Public Health Act and I find that No. 55 is not included in the residential area. The fact on which W.P. 830 of 1958 is based is, therefore, seen to be non-existent and the petition has to be dismissed.

Writ Petition 831 of 1958, however, stands on a different footing. Whether or not No. 55, Muthuvelappa Gounder Street, was a residential area, the Municipality had a right under section 250 of the District Municipalities Act to refuse a licence for the installation of motors, etc., and work an industry in thickly populated areas. Even if the resolution, dated 27th February, 1958, directing the granting of a licence to the second respondent was valid, and that is the basis upon which I am dismissing W.P. 830 of 1958, the question still remains whether the resolution, dated 30th June, 1958, has or has not to be given effect to by the Commissioner.

The factum of the resolution, dated 30th June, 1958, is not in controversy, and the only ground upon which the Commissioner of the Municipality has refused to give effect to it was because he considered that it was illegal. The grounds upon which he based his opinion are really not very relevant for the disposal of this petition, and so I do not propose to dwell on them. I shall assume that the Commissioner of the Municipality was correct in thinking that it was incompetent for the Municipal Council to have passed that resolution because a licence has already been granted to the 2nd Respondent under the previous resolution. The question still remains as to whether the Commissioner could refuse to carry out the resolution of the Municipal Council, because of the doubt he entertained regarding the legality of such a resolution.

To consider this question it is necessary to advert to the scheme of the District Municipalities Act. Part II, Chapter III, of Madras Act V of 1920, after constituting

the Municipal Council as a corporate body (section 6 (2)) sets out in section 13-A the functions of the Executive Authority, that is, the Commissioner. This section enacts:

> "The Executive Authority of the Municipal Council shall (*a*) carry into effect the resolution of the Council;"

The other functions set out in paragraphs (*b*) and (*c*) are not relevant and I am, therefore, omitting reference to them. This duty of the Commissioner, the Executive Authority, is further emphasised by the positive provision of section 22 which enacts:

> "The Executive Authority shall be bound to give effect to every resolution of the Council unless such resolution is modified, suspended or cancelled by a controlling authority."

The group of sections following section 34 deals with the controlling authorities. Section 34 empowers the District Collector to enter upon and inspect any property or work under the control of the municipal authority, and sub-section (2) of that section vests in the State Government and on the District Collector the power to call for information from the Municipal Council in relation to its statutory activities. Section 35 enables the Collector to enforce the execution of resolutions if the Executive Authority makes default in carrying out the resolutions. The power to suspend or cancel resolutions, which is really the power which the Commissioner of the Municipality has purported to exercise in this case, is vested in the State Government under section 36 (1), which enacts.

> "The State Government, may, by order in writing—(i) suspend or cancel any resolution passed, order issued, or licence or permission granted. . . . . in pursuance or under colour of this Act, if in their opinion, ... (*b*) such resolution, order, licence, permission or act is in excess of the powers conferred by this Act, or any other law . . . . . ."

There is a proviso which states that the State Government shall before taking action under this section on any of the grounds referred to in clauses (*a*) and (*b*) give the authority or person concerned an opportunity for explanation. Sub-section (1) (ii) (*c*) of section 38 enables the District Collector to suspend the resolution, orders, licences, permissions granted by the Municipality, if the execution of such resolutions or order or the continuance of such licence or permission or the doing of the act is likely to cause danger to human life, health or safety, or is likely to lead to a riot or an affray. Section 37 vests in Collectors emergency powers but it is not necessary to go more fully into it as it is unnecessary for the purpose of this petition. This in brief is the provision made by the Act for suspending or cancelling the operations of the resolutions passed by the Council which might be held to be in excess of the powers conferred by the Act or other law. It would be seen, therefore, that the power of suspension is vested only in the State Government and the only function of the Commissioner of the Municipality would be to draw the attention of the Government to the supposed invalidity or *ultra vires* character of the resolution and leave it to the State Government to act under the terms of section 36. In my opinion, sections 13-A and 22, taken in conjunction with the specific provisions contained in section 36, leave no room for doubt that the Commissioner of a Municipality is not vested with any power to refuse to carry out the resolution of the Council. His opinion regarding the validity of the resolution cannot form any foundation for enabling him to suspend the resolution, and refuse to perform the statutory duty enjoined on him by sections 13-A and 22 of the Act.

In view, therefore, of these provisions the petitioner is entitled to succeed in W.P. No. 831 of 1958 for the issue of a writ of *mandamus* to direct the Commissioner of the Municipality to give effect to the resolution, dated 30th June, 1958.

I was informed that th Commissioner had forwarded the resolution of the Municipal Council, dated 30th June, 1958, to the Local Government for action under section 36 by way of cancellation, and the Government had not passed orders on this communication because of the pendency of this Writ Petition. The allowance of Writ Petition 831 of 1958 will be no bar to the Government exercising their statutory powers under section 36 (1) of the District Municipalities Act because the reasoning on the basis of which I have allowed the petition is that it was not within the power of the Commissioner to suspend or cancel the resolution of the Municipal Council,

which under section 36 (1) of Madras Act V of 1920, is exclusively vested in the State Government.

W.P. No. 830 of 1958 fails and is dismissed, and the rule *nisi* is discharged. W.P. No. 831 of 1958 succeeds and the rule is made absolute and a writ will issue directing the Commissioner of the Municipality to give effect to the resolution of the Council dated 30th June, 1958. No order as to costs in either petition.

R.M. — *W. P. No.* 830 *of* 1958 *dismissed*; *W. P. No.* 831 *of* 1958 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

K. Meenakshisundaram .. *Petitioner**

v.

S. R. Radhakrishna Pillai .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 11, *rule* 1—*Applicability and scope—Election Tribunal deciding dispute in respect of election to Municipality or Local Board—Power to order interrogatories—Duty to consider objections on the scope of incriminating tendency of interrogatories—Failure to apply mind and consider objections—Order allowing interrogatories—Revision—Competency —Constitution of India* (1950), *Articles* 226 *and* 227—*Powers of High Court—Civil Procedure Code, section* 115.

Election Tribunals are subject to the superintendence of the High Court under Article 227 of the Constitution, such superintendence being both judicial and administrative. Article 227 is wider than Article 226 ; while in a *certiorari* under Article 226, the High Court can only annul the decision of the Tribunal, it can, under Article 227, do that and also issue further directions in the matter. Hence a revision petition to the High Court against the order of an Election Tribunal, when that Tribunal is deciding an election dispute under the Madras District Municipalities Act in regard to elections to Municipalities and Local Boards, is perfectly maintainable.

Hari Vishnu Kamath v. *Syed Ahmad Ishaque and others*, (1955) S.C.J. 267: (1955) 1 M.L.J. (S.C.) 157, followed.

Order 11, rule 1, Civil Procedure Code, would no doubt apply to Election Tribunals and under the rule an Election Tribunal acting in conformity with the rules of the Civil Procedure Code is empowered to order interrogatories. But before ordering interrogatories, it is incumbent upon the Tribunal functioning as a judicial authority to apply its mind and see the effect, import and significance of the interrogatories which are sought to be administered. If any objection is raised by the party to whom the interrogatories are sought to be administered on the ground that they are likely to incriminate him in any criminal offence, it is the bounden duty of the Tribunal to examine the objection, because a party is not bound to answer such interrogatories.

When the Tribunal does not apply or exercise its mind, but orders interrogatories on the sole ground that it has power to do in view of the provisions of Order 11, Civil Procedure Code, which are made applicable, the High Court will interfere in revision and set aside the order of the Tribunal.

Atherley v. *Harvey*, (1876) L.R. 2 Q.B. 524 and *Lamb* v. *Munster*, (1882-1883) L.R. 10 Q.B.D. 110., applied.

Petitions under section 115 of Act V of 1908 and under Article 227 of the Constitution of India praying the High Court to revise the Order of the Court of the Subordinate Judge, Kumbakonam, dated 19th August, 1959 and made in I.A. No. 253 of 1959 in O.P. No. 10 of 1959.

P. S. Sarangapani Ayyangar and *Kumari Maithreyi Ramadurai*, for Petitioner.

K. Raman, for Respondent.

The Court made the following

ORDER.—This Civil Revision Petition is the second of its kind, arising in the same proceedings, *i.e*, election petition, O.P. No. 10 of 1959 on the file of the Court of the Subordinate Judge, Kumbakonam, acting as Election Tribunal. The first of the petitions (C.R.P. No. 1378 of 1959), was filed under section 115 of the Code of Civil procedure ; and since it was understood that such a petition would not lie, that petition has been substituted by the present petition. Therefore, it is not necessary to consider any point arising out of the earlier petition.

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*C.R.P. Nos. 1378 and 1456 of 1959. 22nd September, 1959. (31st Bhadra, 1881—Saka.)

The present petition under consideration is one which seeks to set aside the order of the learned Election Tribunal in I.A. No. 253 of 1959 in the said O.P. No. 10 of 1959. The facts relevant to this petition are that the present petitioner, who is respondent in the said O.P., is the candidate declared elected in a municipal election for Ward VII of Kumbakonam Municipality. The respondent in this Civil Revision Petition who was defeated by about 33 votes in the said election, has preferred an election petition to set aside the election of the petitioner in the Civil Revision Petition on the ground that he resorted to various corrupt practices set out in the election petition. In the course of the pendency of the original petition before the Tribunal, the respondent before me took out an application under Order 11, rule 1 of the Code of Civil Procedure relating to discovery and inspection, praying that the Election Tribunal should be pleased to administer certain interrogatories to the respondent in the said original petition. That petition was taken out under Rule 1. It was objected to by the present petitioner in the Civil Revision Petition. The objection was overruled by the Election Tribunal on the ground that

" the provisions contained in the Code of Civil Procedure would apply in regard to discovery and inspection; and that Order 11. rule 1 of the Code of Civil Procedure referred to discovery which includes interrogatories as well. Therefore, the petitioner is well within his limits to administer interrogatories to the respondent to get the relevant answers ".

Against this order, the respondent in the said original petition has preferred this Civil Revision Petition.

The learned counsel Mr. K. Raman, appearing on behalf of the respondent in this Civil Revision Petition, took exception to the maintainability of this Civil Revision Petition itself on the ground that Article 227 of the Constitution does not enable the petitioner to come up with such an application against the order of the Election Tribunal. I have heard him in full; and I do not think that his arguments have any force. The question as to whether the application under Article 226 or 227 could be filed, has been given final rest by the decision of the Supreme Court in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque and others*[1]. The passage occurring at page 165 of the said decision is in very clear terms, and it states,

"We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution, and that that superintendence is both judicial and administrative. That was held by this Court in *Waryam Singh* and *another* v. *Amarnath and another*[2], where it was observed that in this respect Article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restores the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a *certiorari* under Article 226 the High Court can only annul the decision of the Tribunal it can, under Article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of *certiorari* and for other reliefs was maintainable under Articles 226 and 227 of the Constitution."

Therefore, there can be no more argument against the maintainability of the Civil Revision Petition against the order of the Election Tribunal when that Tribunal is giving decision of election disputes under the Madras District Municipalities Act, 1920, in regard to elections to Municipalities and Local Boards.

The next objection taken by the learned counsel against the maintainability of this Civil Revision Petition was on the ground that the respondent in the original Petition was bound to answer the interrogatories as it was intended to simplify the matters before the actual trial of the petition took place; and that as a matter of fact, all the questions that have been included in the interrogatories to be administered to the respondent in the original petition are quite simple and do not lead to any complications; and that it was within the power of the Election Tribunal to order such interrogatories. It is true that under Order 11, rule 1, and following the rules under that order the Election Tribunal, acting as a Tribunal in conformity with the rules of the Code of Civil Procedure, is empowered to order interrogatories. But, before interrogatories could be ordered, it is also incumbent upon the Tribunal functioning as a judicial authority to apply its mind and see the effect, import and significance of the

1. (1955) S.C.J. 267: (1955) 1 M.L.J. (S.C.) 157.
2. (1954) S.C.R. 565: (1954) S.C.J. 290.

interrogatories that are sought to be administered to the respondent by the petitioner in the original petition. Though the interrogatories have been claimed by the learned Counsel for the respondent in this Civil Revision Petition to be quite harmless and simple, still, it cannot be denied that when they will be put to the petitioner in this Civil Revision Petition, to be answered by him, there will be a lot of inconvenience and also incrimination of himself by reason of the answers that he is expected to give to these questions. Simply because the Election Tribunal has powers under the Code of Civil Procedure under which the Election Tribunal proceedings are to be conducted, it does not mean, however, that all interrogatories that are submitted to the Court could be directed against the respondent forthwith. If there is any objection from the respondent to the answering of these interrogatories, it is the bounden duty of the Court to examine as to how far they are tenable in the present case. A reading of the interrogatories would certainly indicate that these interrogatories are not so innocent and so simple as the learned counsel would appear to make them. That the respondent is not bound to answer the interrogatories which are likely to lead into an incrimination of himself in any criminal offence, has been held in several cases of the English as well as the Indian Courts. Suffice it for me to refer to only two decisions of the English cases reported in Queen's Bench Division Volume II and X. The first decision is in *Atherley* v. *Harvey*[1], where it has been held,

> " Interrogatories asking the defendant whether he has composed or published an alleged libel are objectionable and will be struck out without requiring the defendant to object to them by way of answer."

In this decision it is cited :

> " Demurrers to discovery may be arranged under the following heads : 1. That the discovery may subject the defendant to pains and penalties, or to some forfeiture, &c. If, therefore, a bill alleges anything which, if confessed by the answer, may subject the defendant to a criminal prosecution the defendant may object to the discovery ".

Lush, J., referred to Wigram on Discovery, 2nd Edition, page 80, section 130 to the following effect,

> " If a question involves a criminal charge, the plaintiff is not entitled to an answer to such question, however material it may be to the plaintiff's case", citing *Thorpe* v. *Macauley*[2]; *Atherley* v. *Harvey*[1].

Mellor, J., discusses the definition between the powers conferred on the Judges by the Common Law Procedure Act and the Rules of Equity which were binding upon the Judges. The learned Judge held,

> " Where there is any conflict between the rules of law and the rules of equity, the rules of equity are to prevail, and consequently even a Tribunal composed of the same Judges, as men though not the same Judges in their character as Judges, since they are now judges of the High Court, will be no longer governed by the clauses of the Common Law Procedure Act, if those clauses conflict with the rules of Equity, but will be governed by the rules of equity." (*Atherley's case*[1]).

In the instant case what the learned counsel seeks to emphasise is that it was within the powers of the Tribunal to order interrogatories: and, therefore, he was right in having ordered these interrogatories. But the fact remains that the Tribunal did not consider the rules of equity which ought to have been in its mind when it was ordering the interrogatories. As already observed, to possess the power to order is one thing; and to find out whether such interrogatories could be administered at all is another ; and in so far as this the Election Tribunal does not appear to have exercised its mind in accordance with the rules of equity, despite the fact that the Common Law denies interrogatories to the respondent. Field, J., concurring with Mellor, J., has observed,

> " it is well established in equity that a bill of discovery for the purpose of obtaining the information which is asked for here would be demurrable, that is, the Court of Chancery would not allow the defendant to be harassed by having to answer such questions, but would prevent them from being put." (*Altherley's case*)[1].

The third Judge also concurred with the other two Judges. In *Lamb* v. *Munster*[3], it was held,

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1. (1876) L. R. 2 Q.B. 524, 525, 528 and 529.
2. 5 Mad. 218 at 229.
3. (1882-83) L. R. 10 Q.B. 110-111.

"An objection to answer interrogatories which is made by affidavit on the ground of the tendency of the answer to criminate the person interrogated may be valid, although not expressed in any precise form of words, if, from the nature of the question and the circumstances, such a tendency seems likely or probable. In an action for libel the defendant pleaded a denial of the publication, and to interrogatories asking him, in effect, whether he published the libel he stated by his affidavit in answer : 'I decline to answer all the interrogatories upon the ground that my answer to them' might' tend to criminate me".

It was held in this decision that this answer was sufficient not to lay the interrogatories.

The learned Judges have observed in the course of the Judgment.

"It becomes the duty of the Judge to look at the nature and all circumstances of the case and the effect of the question itself, to see whether it is a question the answer to which will really tend to criminate the witness." (*Lamb* v. *Munster*[1]).

It was further observed by Field, J.,

"I should not regard the form of words, but look to see whether answering would be likely to have or probably would have such a tendency to criminate, and bearing in mind the cardinal rule that a man shall not be compelled to criminate himself, I should almost prefer a man to be careful and say the answer might tend to criminate, and I should be slow to commit him to prison for not doing that which the law says he is not bound to do." (*Lamb* v. *Munster*[1]).

Stephen, J., observes more succinctly in the same judgment when he stated,

"It is not that a man must be guilty of an offence and say substantially, 'I am guilty of the offence, but am not going to furnish evidence of it.' I do not think the privilege is so narrow as that, for then it would be illusory. The extent of the privilege is that I think this : the man may say, 'If you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue'. Prove what you can but I am protected from furnishing evidence against myself out of my own mouth." (*Lamb* v. *Munster*[1]).

The learned Judge also quoted from Cockburn, C.J., When he stated as follows :

"It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection : nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law : and that the Statement of his belief to that effect, if not manifestly made *mala fidr*, should be received as conclusive." (*Lamb* v. *Munster*[1]).

But the further passage quoted by the learned Stephen, J., is to the following effect,

"But he goes on to say that 'the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer', and also the danger must be real and appreciable." (*Lamb* v. *Munster*[1]).

Applying the principle of these two decisions, and scrutinising the interrogatories, it is clearly evident to my mind that in the present case, the petitioner (respondent in the lower Court) is asked whether he has written the letters, and did the several acts referred to in the interrogatories ; and if he answers them, they may endanger him, and if that answer is not in any way *mala fide*, then certainly it ought to be considered sufficient as not to entitle the Court to order the interrogatories. If the witness called upon to answer interrogatoties says this that the answer would tend to incriminate him, meaning thereby that it would tend to bring criminal prosecution for a crime of which, he might be innocent in fact, and of which he might be accused, certainly that would be a situation where the interrogatories cannot be allowed.

On a consideration of all the aspects of this application filed by the petitioner in the original petition and the objection taken to the same by the respondent, I am of the opinion that the learned Election Tribunal was not justified in ordering the interrogatories ; and this Civil Revision Petition is certainly competent ; and it has to be allowed and it is allowed with costs.

It may further be observed that all the points that arise in the interrogatories would be subject of a cross-examination of the petitioner in the Civil Revision Petition when he goes into the witness box and nothing could prevent the petitioner in the Original Petition to cross-examine him on all the aspects which are contained in the interrogatories. It need not be held that because the interrogatories could not be

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1. (1882-83) L.R. 10 Q.B. 111 and 113.

administered, questions concerning the points that arise in the interrogatories are also not admissible when the respondent in the original petition is in the witness box to support his case. In fact, all these points that arise from the interrogatories could be very well put to the respondent in the original petition and answers elicited from him in the course of the trial of the petition, and subject to any objections that might be raised by the witness from the witness box stating his inability to answer the same.

The order and records in this petition will be despatched expeditiously so that the trial of the election petition need not be held up.

P.R.N. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

G. Mohana Krishna Naidu .. *Appellant**

v.

The National Bank of India Ltd., by its Manager, Madras .. *Respondent.*

Madras Shops and Establishment Act (XXXVI of 1947), *sections* 41 *and* 45—*Effect of an order setting aside the dismissal of an employee contrary to the Statute—If employee should be deemed to be in service—Jurisdiction of Civil Court.*

Master and Servant—Wrongful dismissal—Right of an employee to re-instatement —Relief of declaration that the service is deemed to continue.

It is no doubt true that a termination of service of an employee contrary to the provisions of section 41 (1) of the Madras Shops and Establishment Act will be illegal and section 45 (1) of the Act provides a penalty for such contravention. But the employee would be entitled only to damages for wrongful dismissal.

When an employee resorts to the remedy of prosecution of his employer under section 45 (1) of the Act for contravention of section 41 (1) of the Act it is not open to him to claim relief on the basis that his services have not been dispensed with. Where the services of an employee have been wrongfully terminated it is open to the employee to treat himself as continuing in service and claim salary or he may claim damages for wrongful dismissal. In the former case he will be disabled from seeking employment elsewhere while in the later case he will be free to do so.

Appeal against the decree of the City Civil Court of Madras (IV Assistant Judge) in Original Suit No. 1222 of 1954.

S. Mohan Kumaramangalam and *K. V. Sankaran,* for Appellant.

O. T. G. Nambiar instructed by *M/s. King and Partridge,* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff appeals from the judgment and decree of the City Civil Judge, Madras, dated 28th February, 1956 in O.S. No. 1222 of 1954 on his file. The plaintiff was employed as a clerk in the defendant-bank. On 29th June, 1951, the plaintiff was served with an order that his services were terminated with immediate effect. He had been in the service of the bank from 1939 and was, in the matter of removal from service, entitled to the protection granted by section 41 of the Madras. Shops and Establishments Act, 1947. Section 41 is in these terms :

"(1) No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided, however that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held for the purpose.

(2) The person employed shall have a right to appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

(3) The decision of the appellate authority shall be final and binding on both the employer and the person employed."

From the order terminating his services, the plaintiff appealed to the Additional Com-

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*City Civil Court Appeal No. 51 of 1956. 28th September, 1959.
(6th Asvina, 1881—Saka).

sioner for Workmen's Compensation, the authority prescribed by the Government in that behalf under section 41 (2) of the Act. The Additional Commissioner for Workman's Compensation, after hearing both parties, passed an order on 22nd October, 1951, setting aside the order of the defendant, dated 29th June, 1951. On receiving the appellate order, the plaintiff presented himself in the office of the defendant-bank on 5th November, 1951 and said that he was reporting himself for duty. The bank told him by letter, dated 5th November, 1951, that he had been advised on 29th June, 1951, that his services had been terminated with immediate effect and that the bank still did not require his services. The plaintiff went and filed a complaint before the Presidency Magistrate (C.C. No. 10298 of 1951) against the defendant of an offence punishable under section 45 of the Madras Shops and Establishments Act.

Section 45 (1) is in these terms :

"Any employer who contravenes any of the provisions of sections 7, 9 to 11, 13 to 23, 25, 26, 29 to 41 and 47 shall be punishable, for a first offence, with fine which may extend to twenty-five rupees, and for a second or subsequent offence, with fine which may extend to two hundred and fifty rupees."

In relation to section 41, section 45 (1) may be thus rendered

" Any employer who dispenses with the services of a person employed under him otherwise than in accordance with the provisions of section 41 shall be punishable...."

On that complaint, summons was served on the defendant-bank. The Manager appeared and pleaded guilty. He was fined Rs. 20 by the Fifth Presidency Magistrate by his Judgment dated 5th January, 1952.

The plaintiff applied to the All India Industrial Tribunal (Bank Disputes) Bombay, praying that the defendant-bank be directed to take the plaintiff into its services in pursuance of the order of the Additional Commissioner for Workmen's Compensation. The Industrial Tribunal does not appear to have passed any orders on the plaintiff's application.

The plaintiff filed a writ petition in this Court W.P. No. 538 of 1952 praying that the defendant-bank be directed to reinstate him in service. This Court (Govinda Menon, J) held in *Mohanakri hnaiah Naidu* v. *National Bank of India and another*[1], following the observations of Lord Goddard, Lord Chief Justice, in *Rex* v. *The National Arbitration Tribunal* Ex parte *Horatio Crowther and Co., Ltd.*[2], that the Court could not compel a private employer to employ a workman against the employer's will. Govinda Menon, J., added :

" The punishment for contravening an order under section 41 of the Act is the imposition of a fine as contemplated in section 45.... In these circumstances it seems to me that no writ of *mandamus* can be issued and that this petition must be dismissed. This does not mean that the petitioner's ordinary common law remedy to file a suit for damages for wrongful non-reinstatement is in any way interfered with or barred."

With those observations, the learned Judge dismissed the plaintiff's petition for a writ. That order was pronounced on 24th September, 1953.

The plaintiff instituted the suit which has given rise to this appeal, in the City Civil Court praying for a declaration that he continued to be in the service of the defendant's bank and for a decree directing the bank to pay the plaintiff his salary from 29th June, 1951 up to 1st March, 1954 aggregating to Rs. 6,871-10-0. In the alternative, the plaintiff prayed for a direction to the defendant-bank to pay the plaintiff damages from 29th June, 1951 to 1st March, 1954 for wrongful non-reinstatement. As damages, the plaintiff claimed the same sum that he claimed as arrears of salary, namely, Rs. 6,871-10-0. The learned City Civil Judge held that the plaintiff was not entitled to arrears of salary but was entitled to damages for wrongful dismissal. The learned Judge granted the plaintiff damages estimated at a month's salary. Aggrieved by that judgment, the plaintiff prefers this appeal.

The main question for decision in this appeal relates to the effect of an order passed by the appellate authority under section 41 (2) of the Madras Shops and Establish-

1. (1954) 1 Lab.L.J. 136.
2. (1947) 2 A.E.R. 693.

ments Act setting aside the order passed by an employer dispensing with the services of an employee who is entitled to the protection of section 41 (1) of the Act. The respondent's learned counsel contends that the only consequence of a contravention of section 41 (1) is liability to punishment under section 45 and that, otherwise, the rights and obligations of the parties are governed by common law. Under common law unaffected by the statute, an employer has subject to the terms of the contract between the parties, the right to dispense with the services of an employee on giving him reasonable notice or wages or salary in lieu of notice. Reasonable notice has been held to be a month's notice or three months' notice according to the nature of the employment. On that common law right, restraints are imposed by section 41 (1) of the Madras Shops and Establishments Act. Uner the Act, dismissal is not permissible except for reasonable cause or for misconduct. Where the services are terminated for reasonable cause as for example when the post which the employee is occupying has to be abolished in the interests of the efficient working of the institution and the employee is not qualified to be offered any other post borne on the establishment of the employer, the employee's services may be dispensed with if he is given a month's notice or a month's wages. If the employee is guilty of misconduct and if such misconduct be established by satisfactory evidence adduced in the presence of the employee, his services may be dispensed with immediately, he not being entitled either to notice or wages in lieu of notice. Except for reasonable cause or for misconduct, the employer cannot dismiss the employee provided he has been employed for not less than six month , by merely giving him notice or salary in lieu of notice. Section 45 enacts that, where the employer dispenses with the services of an employee otherwise than in accordance with section 41, the employer shall be punishable with fine. The respondent's learned advocate contends that, in case the employer disponses with the services of his employee otherwise than in accordance with section 41, the employer's only iliability, so far as the obligation laid on him by section 41 is concerned, is the liability to prosecution under section 45 and the employee's only right is the right which he has under the common law to sue the employer for damages for wrongful dismissal. The employee would not, even where the employer's order is set aside under section 41 (2) be entitled to claim, urges the learned counsel for the respondent, that the employee continues in the services of the employer and is entitled to salary on that basis. In support of that proposition, the respondent's learned counsel relies on *Pasmore* v. *Oswaldtwistle Urban District Council*[1]. The facts in that case were these. Under section 15 of the Public Health Act, 1875, it was the duty of the local authority to make such sewers as might be necessary for effectually draining their district. A ratepayer, who considered that the local authority had not made arrangements for having the premises in his occupation effectively drained, brought an action for *mandamus* against the authority. The Public Health Act had a section which said that, for neglect of duty in that matter by the local authority a complaint might be made to the Local Government Board. That particular ratepayer had not made a complaint to the Local Government Board, but resorted to the civil Court for remedy. It was held that the remedy for his grievance was that provided by the Act, namely, a complaint to the Local Government Board, and that the action for a writ of *mandamus* was not maintainable. That decision would be appropriate if, in this case, the employee, namely, the plaintiff had resorted to the civil Court for relief against the order terminating his services made by the employer in June, 1951, without preferring an appeal to the authority prescribed under section 41 (2) of the Act. For an order of removal from service not justifiable under section 41 (1), the remedy of appeal is provided. That remedy is in substitution of the ordinary remedy of a suit in a civil Court in regard to an order for wrongful dismissal. But where that remedy has been availed of and the order has been set aside, the relief that the plaintiff seeks, namely, compensation for the period of non-employment could not be obtained by him by prosecuting the bank under section 45 of the Act. Where the remedy provided by the statute does not provide for the grant of the relief that the plaintiff seeks, the provision of that remedy does not bar the jurisdiction of Civil Courts to grant the plaintiff the relief he seeks. I am unable therefore to hold that the principle of the ruling

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1. L.R. (1898) A.C. 387.

in *Pasmore* v. *Oswaldtwistle Urban District Council*[1], bars the plaintiff's suit for a declaration that he continues to be in the service of the defendant and to a decree for salary on that basis. The same observations apply to the decision in *Wake* v. *Mayor &c. of Sheffield*[2].

Respondent's learned counsel contends next that the relief of grant of salary for the period subsequent to 29th June, 1951, could be granted to the plaintiff only on the basis that the order dispensing with the services was void or was a nullity and that no such order could in law be ever regarded as void or as a nullity. In support of that proposition learned counsel relies on *Barber* v. *Manchester Regional Hospital Board*[3]. The facts in that case were these. The services of a medical practitioner borne on the establishment of the National Health Service were terminated by the Regional Hospital Board. The rules relating to the termination of the services of a medical practitioner in his situation required that, if he sent a full statement of the facts to the Minister, he should place the case before a professional committee for advice and that the Board's decision to terminate the medical practitioner's service could not be carried into effect until the Minister had passed orders on the advice of the professional committee. In that case, the practitioner sent a statement of the facts to the Minister. The Minister took no action as required by the rules. The Regional Hospital Board prevented the practitioner from continuing to work as a member of the establishment. He then brought an action claiming salary due to him on the basis that he continued to be borne on the establishment of the national health service. It was held that the order terminating his services could not be regarded as void or as a nullity, but, since it was given effect to, should be regarded as wrongful termination of his services entitling him to damages. I agree with the appellant's learned counsel that the decision would be applicable if in this case there had not been an order by the appellate authority setting aside th order passed by the employer terminating the services of the plaintiff. There was no order or act in *Barber's case*[3], which set aside the order passed by the Regional Hospital Board terminating the services of the medical practitioner. Here the effect of the order of the appellate authority in setting aside the order of the employer was to cause the order to cease to be in existence. That in fact has been expressly so decided in *Tata Iron and Steel Co. Ltd*[4]. There is, further authority in this Court for the propositionthat where an order passed by an employer under section 41 (1) is set aside by the appellate authority under section 41 (2), the employee may regard himself as continuing in service and may claim salary on that basis (please see *Balasundara Mudaliar* v. *Ellappa Mudaliar*[5] and *Dhandapani* v. *Salem Co-operative Whole-sale Stores*[6].

I do not consider that the decisions in *Balasundara Mudaliar* v. *Ellappa Mudaliar*[5] and *Dhandapani* v. *Salem Co-operative Whole-sale Stores*[6], compel the Court in every case in which an order has been set aside by the appellate authority under section 41 (2) of the Act to hold that the employee continues in service notwithstanding that the employer declines to reinstate him. It will be open to the employee in such a case to treat himself as continuing in service or he may regard the order terminating his services as an order of wrongful dismissal and may claim damages for wrongful dismissal. In the former case, that is, where he regards himself as continuing in service, he would be disabling himself from seeking employment elsewhere. In the latter case, namely, where he regards the order as an order of wrongful dismissal from service, he would be free to claim damages for wrongful dismissal and seek employment elsewhere. It would, in my opinion, be competent for the Court in a proper case to hold that, notwithstanding that the employee has not declared his intention to treat the order terminating his services as an order of wrongful dismissal, he would be entitled to relief only on the basis of damages for wrongful dismissal and not on the basis of salary for continuance in service. Where the employee's conduct subsequent to the termination of his services is such as to disentitle him to regard him-

1. L.R. (1898) A.C. 387.
2. L.R. (1883) 12 Q.B.D. 142.
3. (1958) 1 All E.R. 322.
4. (1950) 2 Lab.L.J. 1043.
5. (1957) 1 M.L.J. 7.
6. (1959) 1 M.L.J. 108.

self as continuing in service, it would be unjustto the employer to pass a decree against him for salary on the basis of continuance in service. In this case, the evidence adduced in the lower Court shows that, shortly after 5th November, 1951, when the employer declined to take the employee back into its service, the employee filed a complaint against the employer under section 45 (1) of the Act. On that complaint, the bank's manager appeared, pleaded guilty and was fined. The point whether the plaintiff's conduct in prosecuting the defendant under section 45 (1) for contravention of section 41 did not disentitle the plaintiff from seeking relief on the basis that he continued in service had not been taken by the respondent. But the point arises on the proved facts and I have heard the appellant's learned counsel' arguments on the question whether the plaintiff was disentitled, by his conduct in getting the defendant convicted of an offence under section 45 (1) from seeking relief on the basis that the plaintiff continued in the service of the defendant. The appellant's learned counsel has referred me to the language of the complaint preferred by the plaintiff and says that the complaint was in essence a complaint for disobedience on the part of the defendant of the order passed by the appellate authority on 22nd October, 1951 and cannot be regarded as a complaint relating to the order passed in June, 1951. With a view to enable me to pronounce judgment on that point and so as to bring into the record the complaint on whose language reliance is placed by the appellant's learned counsel, I am marking the copy of the complaint and of the judgment of the magistrate produced by the respondent's learned counsel as additional evidence in this appeal. There was nothing in the order passed by the appellate authority which called for obedience. The appellate authority set aside the order of the defendant bank on the ground that the order constituted a contravention of the provisions of section 41 (1) of the Act. Section 45 (1) of the Act provides for punishment for such contravention, that is, for the termination of the services of an employee otherwise than in accordance with the provisions of section 41. An employee who prosecutes his employer for an offence under section 45 (1) necessarily complains of his (employee's) services being dispensed with otherwise than in accordance with section 41 (1). After getting the employer convicted of dispensing with the services of the employee in contravention of the statute, the employee is not free to claim relief on the basis that his services have not been dispensed with, that the order dispensing with his services should, in view of the order of the appellate authority, be deemed to be null and void and that the employee should be deemed to continue in the service of the employer. I find that the interests of justice require in this case that relief should be granted to the plaintiff not on the basis that he continues in the service of the employer (the defendant), but on the basis that he has been wrongfully dismissed from service. The lower Court's view that the plaintiff is entitled only to damages for wrongful dismissal and not to arrears of salary, was correct, though not for the reasons stated by it.

The next question relates to the measure of damages. The damages granted by the lower Court are grievously inadequate. The defendant, who declined wilfully to admit the plaintiff to the defendant's services notwithstanding that the appellate authority had set aside the defendant's order, was guilty of wilful wrong-doing for which the damages to be awarded should be exemplary. I award the plaintiff salary for nine months as damages in the place of salary for one month awarded by the lower Court. The appeal is allowed to that extent. There will be a decree for damages accordingly. The defendant will further pay the plaintiff full costs in both the Courts and pay the Court-fee due to the Government in both Cour s.

R.M. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

The Union of India, by Secretary, Finance Department .. *Appellant**

v.

Jayaram Damodhar Timiri .. *Respondent.*

Civil Service Regulations, Article 193 (*b*)—*Applicability—Applies only in case of departmental inquiries into the misconduct—Suspension because of charges in criminal Court against the servant—Provision does not apply—Arrears of salary during period of suspension on acquittal by Criminal Court—Right to.*

The provision contained in Article 193 (*b*) of the Civil Service Regulations is intended only to apply to case of departmental inquiries into the misconduct of a Government servant. Where the Government servant was placed under suspension because there were charges pending against him in a criminal court, once he was acquitted and in the absence of any further disciplinary proceedings launched by the Government, the Government servant would be entitled to continue in the employment and should be reinstated. Under the general law he would be entitled to arrears of salary for the period of suspension.

On appeal from the judgment and decree of Mr. Justice Rajagopala Ayyangar, dated 27th September, 1955 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 11 of 1952.

The Government Pleader (*K. Veeraswami*) and *P. Venkataswami*, for Appellant.

V. S. Rangachari, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal from the Judgment and decree of Rajagopala Ayyangar, J., in a suit on the Original Side of this Court, C.S. No. 11 of 1952, file *in forma pauperis* by the respondent, Jayarama Damodar Timiri, for the recovery of sums of money from the Union of India in the following circumstances. The plaintiff-responden was appointed temporary clerk in the Military Accounts section of the Defence Department of the Union of India on 6th September, 1943. It is common ground that one of the terms of the appointment was that if the Government or the appointing officer shall at any time become desirous of dispensing with the services of the employee, the Government or the appointing officer shall give the employee one calendar month's notice in writing of such desire, and the Government or the appointing officer may, at any time without notice, dispense with the services of the employee for gross misconduct, of which misconduct the officer dispensing with the services of the employee shall be the sole judge. On 20th June, 1947, the plaintiff was placed under suspension pending investigation into certain charges of defalcation against him. A case was laid against him before the Magistrate at Poona in July, 1947 ; but it was withdrawn. Subsequently, a second charge-sheet was preferred against him in December, 1948, before the Resident-Magistrate of Poona who committed him to be tried in the Sessions Court for offences under sections 420, 467, 468, 471 and 474, Indian Penal Code. The learned Sessions Judge of Poona who tried the case passed an order on 23rd June, 1950, acquitting the accused. It may be mentioned that the case was tried with a jury in so far as the offences fell under sections 467 and 471, Indian Penal Code. The jury and the assessors were unanimously of opinion that the plaintiff was not guilty of the offences with which he was charged. Though the acquittal was on 23rd June, 1950, the plaintiff was not reinstated in spite of requests from him. Finally, on 29th August, 1950, two orders were passed. One of them ran thus :

"Sri T. D. Jayaraman (Plaintiff) A/c No. 23933, temporary U.D.C., who is under suspension, is reinstated in service on 1st September, 1950.

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*O.S. Appeal No. 3 of 1956. 9th November, 1959, (18th Kartika, 1881—Saka).

The subsistence allowance and the dearness allowance upto and for 31st August, 1950, paid to him have been treated as the salary and allowances to be paid to him for the period of suspension under Article 193 (*b*), Civil Service Regulations."

The second order passed on the same date ran thus :

" T. D. Jayaraman, Temporary Upper Division Clerk who was under suspension and has been reinstated in service (*vide*: Part I.G.O.) is discharged from service from 1st September, 1950, *f.n.*, his services being no longer required. He will be paid one month's pay in lieu of notice."

Thereupon, the plaintiff filed the suit, out of which this appeal arises, for recovery of a sum of Rs. 3,083-8-6, representing the balance of his salary and allowances for the period from the date of suspension to the date of reinstatement after giving credit to the interim subsistence allowance paid to him from 21st June, 1947 to 31st August, 1950, and a sum of Rs. 50,715, representing his salary from 1st October, 1950 to 1979, when the plaintiff would attain the age of 55, at Rs. 147, per month. This latter relief was claimed as an alternative to the main relief of reinstatement in service.

The suit was tried by Rajagopala Ayyangar, J., who granted the plaintiff's first prayer and passed a decree in his favour for Rs. 3,083-8-6, but dismissed the other claim for Rs. 50,715. The Government have filed the above appeal. But the plaintiff has not challenged the correctness of the finding of the learned Judge as regards his claim for damages for improper termination of his services. However, he filed a memorandum of cross-objections in respect of costs which were allowed in favour of the defendant for the amount claimed, which the learned Judge had negatived. The amount involved was Rs. 2,170.

The case for the Government was rested entirely on the provision contained in Article 193 (*b*) of the Civil Service Regulations. Article 193 (*a*) provides that a subsistence allowance may be granted by the authority suspending him, to an officer removed from office pending enquiry into his alleged misconduct at certain rates. H may also be paid in addition any compensatory allowance, of which he was in receipt on the date of suspension to such extent and subject to such conditions as the uspending authority may direct. Clause (*b*) is in the following terms :

" When the suspension of a Government servant is held to have been unjustifiable or not wholly justifiable, or, when a Government servant who has been dismissed, removed or suspended is reinstated. the revising or appellate authority may grant to him for the period of his absence from duty—

(*a*) if he is honourably acquitted, the full salary to which he would have been entitled if he had not been dismissed, removed or suspended, and by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal, removal or suspension ; or

(*b*) if otherwise, such proportion of such salary and allowances as the revising or appellate authority may prescribe."

The argument was that the criminal Court had acquitted the plaintiff only by giving him the benefit of doubt and that there was no positive finding that he was innocent. It is only in this sense that it was urged that he was not honourably acquitted. In the first place, we are unable to understand the legal significance of an expression like " honourably acquitted ". Certainly, the Code of Criminal Procedure does not support this conception The onus of establishing the guilt of the accused is on the prosecution, and, if it failed to establish the guilt beyond reasonable doubt, the accused is entitled to be acquitted. Moreover, it appears clear to us that the provision of Article 193 (*b*) was intended only to apply to cases of departmental enquiries into misconduct. In this case, the plaintff was placed under suspension, because there were charges pending against him in a criminal Court. Once he was acquitted, in the absence of any further disciplinary proceedings launched by the Government, the plantiff would be entitled to continue in the employment and he should be reinstated. It is evidently for this reason that, though at a later date, the plaintiff was formally reinstated and then discharged from service in accordance with the provisions of clauses 5 and 6 of the agreement between the plaintiff and the Union Government. Even the order of discharge mentioned above did not say that the plaintiff's services were being terminated on account of any misconduct. The only reason was that his services were no longer required and the Government was entitled to say that because, the respondent was only holding a temporary pos:

Once the plaintiff w s cquitted, he was, as we have said above, entitled to be restored to the office which he was holding, and ordinarily, he would be entitled to full salary which he would have drawn, if he had not been suspended, for the period of s pension. The only qu stion is whet er the provisions of Article 193 would deprive him of his right and confer on the authoities the right to a grant to him such propo tion of salary and allowances as might be prescribed by the authorities. As we have h ld that Arti le 193 was totally inapplicable, it follows that under the general law, the plaintiff was entitled to arrears of salary for the period of suspension, of course d ducting the pay and allowances paid to him during that period. The appeal by the Government fails and is dismissed with the costs of the respondent.

The memorandum of c oss-objections relat s to costs of the suit. The learned Judge, while granting to th plaintiff costs on the sum of Rs. 3,083-8-6, in respect of which he passed a decree in plaintiff's favour, also directed the plaintiff to pay to the Government costs on the amount claimed, but disallowed by the Court. The result would be that, though the pla tiff had succeeded in establishing a part of his claim, he would have to pay a large amount to the Government for costs. We think the interests of justice will be served if we direct both the plaintiff and the Government to bear their own costs of the sui

The Court-fee due to the Gover ment on the plaint will be paid to the Government by the plaintiff. So far as the appeal by the Government is concerned, we have lready directed it to be dismissed with costs The memorandum of objections is allowed in part but without costs. The plaintiff will pay the Court-fee on the memorandum of cross-objections to the Government.

V.S. *Appeal dismissed.*

Memo. of objections allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE SUBRAHMANYAM.

Muhammad Badsha Saheb and others .. *Appellants**

v.

Duraisami Goundan .. *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), sections 4 and 6 and 6-A—Power of Civil Court to order restitution before transferring a suit or proceedings to the Revenue Court.

Section 6-A of the Madras Cultivating Tenants Protection Act does not by itself effect an automatic transfer of the suits referred to therein from the Civil Court to that of the Revenue Divisional Officer without an order of transfer being made by the Civil Court on whose file such suits or proceedings are pending. Hence where a suit or proceeding is pending on the file of a civil Court it is open to that Court to make an order for restitution to possession to the aggrieved party before transferring the suit to the Revenue Divisional Officer under section 6-A of the Act and Sections 4 and 6 of the Act will not bar the Civil Court from making such an order.

Appeal against the order of the District Court of North Arcot at Vellore, dated 27th August, 1958 and made in A.S. No. 346 of 1956 (R.E.A. No. 158 of 1956 in R.E.P. No. 387 of 1954, in O.S. No. 379 of 1952, District Munsif Court, Tirupattur).

K. Krishnaswamy Iyengar and *T. Krishnaswami Iyengar,* for Appellants and Petitioners.

V. V. Raghavan, for Respondent in both.

The Court made the following

ORDER.—The appeal (C.M.S.A. No. 80 of 1958) is from the order, dated 27th August, 1958, passed, by the District Judge of South Ar ot in A.S. No. 346 of 1956 on his file. C.R.P. No. 2037 of 1958 is preferred from the order p ssed by the Assistant Collector, Tiruppattur, on 9th June, 1958, in T.P. No. 58 of 1957.

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*A.A.A.O. No. 80 of 1958.
(C.R.P. No. 2037 of 1958.)

11th December, 1959.
(20th Agrahayana, 1881—Saka.

S. T. Muhammad Hussain leased the land to which the appeal and the petition relate, on 7th June, 1951, to Duraisami Goundan. The lease expired with 12th May, 1952. Muhammad Hussain instituted O.S. No. 379 of 1952 on the file of the District Munsif of Tirupattur for evicting Duraisami Goundan. A decree *ex parte* was passed in that suit on 16th September, 1954. Duraisami Goundan applied on 17th September, 1954, that the decree be set aside. During the pendency of that application, he was dispossessed, in execution of the decree, on 30th October, 1954. The decree was set aside on 5th April, 1955. Madras Act XXV of 1955 (Madras Cultivating Tenants' Protection Act) came into force on 24th September, 1955. On 15th February, 1956, Duraisami Goundan filed an application for restitution, that is to say, to be put back in possession of the property. That application was pending until 3rd November, 1956. On 24th August, 1956, by Amending Act XIV of 1956, section 6-A was introduced in Madras Act XXV of 1955. Section 6-A requires that any suit pending before a Court for possession of land against a person who is a cultivating tenant entitled to the benefits of the Act should be transferred to the Revenue Divisional Officer having jurisdiction over the area in which the land is situate. When section 6-A became part of Madras Act XXV of 1955, the suit O.S. No. 379 of 1952 was pending on the file of the District Munsif's Court, Tirupattur. The plaintiff in that suit namely, Muhammad Hussain was in possession by reason of having taken possession in pursuance of the decree which had been passed *ex parte*. The application for restitution, namely, the application by the defendant to be restored to possession, was pending. On 3rd November, 1956, the learned District Munsif passed an order allowing the application for restitution and directing the transfer of the suit to the file of the Revenue Divisional Officer.

The Revenue Divisional Officer took the suit on file and registered it as a petition. While it was pending on his file, Muhammad Hussain died. His legal representatives applied that they be brought on record. The learned Revenue Divisional Officer held that there was no provision in Madras Act XXV of 1955 under which he could add legal representatives of the deceased petitioner. In that view, he dismissed the application and the petition which was pending on his file. The result was that Muhammad Hussain was in possession of the property and there had not been a disposal, on the merits, of the suit which he had instituted for possession.

The order for restitution which had been made in favour of the defendant by the District Munsif was appealed from by Muhamad Hussain. In that appeal, his legal representatives were added. They prosecuted the appeal. Pending appeal there was stay of execution of the order for restitution. Consequently, Muhammad Hussain's representatives continued in possession. The appeal was dismissed by the learned District Judge. From the order of dismissal, C.M.S.A. No. 80 of 1958 has been preferred.

During the pendency of this appeal, execution of the order of restitution has been stayed with the result that the legal representatives of Muhammad Hussain continue in possession. They applied in T.P. No. 58 of 1957 before the Revenue Divisional Officer for eviction of the defendant. But since they were in possession, no question of eviction could arise. On that ground, the Revenue Divisional Officer dismissed that petition. From the order of dismissal, they have preferred C.R.P. No. 2037 of 1958.

Learned counsel for the petitioners, namely, the legal representatives of Muhamad Hussain, contends that the orders of restitution passed by the District Munsif was wrong because that order contravened the provisions of section 6 of Madras Act XXV of 1955 read with section 4 of the Act. Sections 6 and 4 are in these terms :

"*Section* 6.—No civil Court shall, except to the extent specified in section 3 (3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under this Act to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

"*Section* 4.—Every cultivating tenant who was in possession of any land on the 1st December, 1953 and who is not in possession thereof at the commencement of this Act shall, on application to the

Revenue Divisional Officer, be entitled to be restored to such possession on the same terms as those applicable to the possession of the land on the 1st December, 1953 ".

The defendant was in possession of the lands on 1st December, 1953. He was not in possession at the commencement of Madras Act XXV of 1955, namely, on 24th September, 1955. Dispossession was due to execution of the decree which had been passed *ex parte* on 16th September, 1954. When the Act came into force, the decree had been set aside and the defendant was entitled to be restored to possession. The argument of the learned counsel for the petitioners is that an application to be restored to possession should, under section 4 of the Act, be made to the Revenue Divisional Officer and that the civil Court's jurisdiction to entertain an application for restitution was barred by section 6 of the Act. The point is whether that contention is correct.

Sections 4 and 6, as indeed every other section of the Act, should be so construed as to give effect to the purposes of the Act and so as not to result in the blurring of limits of jurisdiction in the sphere of administration of justice.

In *Kuppammal* v. *Vellingiri Goundar*[1], it was held that section 4 would not apply to a tenant who was in possession on 1st December, 1953 and was not in possession on 24th September, 1955, by reason of his having voluntarily surrendered possession. Such a tenant would be within the language of the section because he was in possession on 1st December, 1953 and was not in possession on 24th September, 1955. But the Court held that section 4 would not apply to him because he had not been evicted but voluntarily surrendered possession.

In the case before us, the tenant, was evicted but he was evicted in the course of a suit in execution of a decree which was subsequently set aside. In such a case, the tenant has a right to file an application for restitution in the pending suit. It would be a violation of the normal processes of law to hold that an application in a suit which is pending in a civil Court and which cannot be transferred to a Revenue Court should be made to a Revenue Court. On the date on which the application for restitution was made by the appellant, namely, 15th February, 1956, section 6-A had not been made part of Madras Act XXV, of 1955. The suit could not, therefore, on that date, be transferred to the Revenue Divisional Officer and was validly pending in the Court of the District Munsif. An application for restitution would ordinarily have to made to the District Munsif in that pending suit. To hold that such an interlocutory application in a suit which was pending in the District Munsif's Court should, under section 4 read with section 6, be made in the Court of the Revenue Divisional Officer would result in such conflicts of jurisdiction as could not possibly have been intended by the Legislature. I hold that it was not the intention of the Legislature, in enacting sections 6 and 4 of Madras Act XXV of 1955, that any application in a suit pending in the District Munsif's Court should be made to a Revenue Divisional Officer. I find that the application for restitution was properly made to the District Munsif on 15th February, 1956. The District Munsif had on that date jurisdiction to entertain the application and to dispose of it on its merits.

While the application for restitution was pending, section 6-A was, by the enactment of Act XIV of 1956, made part of Madras Act XXV of 1955 on 24th August, 1956. The District Munsif became thereby bound to transfer the suit to the Court of the Revenue Divisional Officer. Section 6-A does not by itself cause an automatic transfer of suits dealt with in that section without an order of transfer being passed by the District Munsif. For comparison, we may refer to section 8 (1) of Madras Act X of 1955, which, with reference to an analogous matter, enacts :

" All suits pending in the High Court on the date of the commencement of this Act and which would be within the cognizance of the Madras City Civil Court shall stand transferred to the Madras City Civil Court ".

Under that section, it will be seen, suits stand transferred by the operation or the Act without the need for the intervention of an order of transfer by any Court.

1. (1956) 70 L.W. 11.

Reference may be made also to section 60 (6) of Central Act XXXVII of 1956. Under section 6-A of Madras Act XXV of 1955, on the other hand, an order of transfer has to be passed by the civil Court on whose file the suit is pending before the Revenue Divisional Officer could acquire jurisdiction to deal with the matter. Until the order of transfer is made, the civil Court in which the suit is pending, would have jurisdiction to pass all orders required to be passed in the pending suit. The District Munsif on whose file the application for restitution was pending did not lose jurisdiction to pass an order for restitution by reason merely of the enactment of Madras Act XIV of 1956.

The suit which the District Munsif had to transfer to the Revenue Divisional Officer under section 6-A was a suit for eviction. There would be no point in transferring a suit for eviction if the plaintiff was himself in possession of the property on the date on which the Revenue Divisional Officer would acquire jurisdiction to deal with the subject-matter. The District Munsif was therefore right in passing an order of restitution before transferring the suit and in thereafter transferring the suit to the Revenue Divisional Officer. The order passed by the District Munsif on 3rd November, 1956, is correct and the order passed in appeal is also right.

C.M.S.A. No. 80 of 1958 is dismissed. The parties will bear their own costs in the appeal.

The C.R.P. is from the order passed by the Revenue Divisional Officer dismissing the petition for eviction on the ground that the petitioners were themselves in possession on the date on which they applied for possession. As a result of the order passed in C.M.S.A. No. 80 of 1958, the respondent in that appeal will obtain possession. He would therefore be a cultivating tenant against whom an application for eviction might be made. That application would have to be dealt with on the merits by the Divisional Officer. The order passed by the Divisional Officer in T.P. No. 58 of 1957 is set aside. He will restore the petition to its original number and dispose of it afresh in accordance with law. The parties will bear their own costs.

R.M. ——— *Appeal dismissed : Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

B. V. Nanja Raja and another .. *Petitioners**

v.

Lalitha Ammal and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 51—*Order in appeal under—If could be reviewed—Appellate Tribunal (High Court)—If* persona designata—*Civil Procedure Code (V of* 1908), *Order* 47—*Scope.*

Obiter.—A right of review, like right of appeal, is wholly statutory and in the absences of specific provisions in the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, or the Rules made thereunder, the Special Tribunal (High Court) constituted under section 51 of the Act could not have the power of reviewing its order. The Judges of the High Court in hearing an appeal under the section would be functioning as *persona designata.*

Application under section 114 of the Civil Procedure Code for review of the Judgment of the High Court, dated 3rd May, 1957, in S.T.A. No. 137 of 1954, preferred against the order of the Estates Abolition Tribunal, Vellore, in O.P. No. 49 of 1953.

R. Gopalaswami Ayyangar and *N. C. Srinivasan,* for Petitioners.

D. R. Krishna Rao and *K. Subramaniam,* for Respondents.

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*S.T. Petition No. 62 of 1958. 1st October, 1959 (9th Asvina, 1881—Saka).

The Court made the following

ORDER:—This is a petition for review of the judgment we rendered in S.T.A. No. 137 of 1954. In view of the points urged in this application for review, it is necessary briefly to set out the point which arose for decision in S.T.A. No. 137 of 1954 and the details of our judgment in that appeal.

Berikai was an impartible estate which was notified and taken over by Government under the Madras Estates Abolition Act (Act XXVI of 1948). The present petitioners are the legal representatives of one Veerabadra Rao, who obtained a decree for arrears of maintenance against the then Berikai Zamindar. The decree was passed in O.S. No. 59 of 1945 on the file of the Sub-Court, Salem, on 18th September, 1945, and thereafter the judgment-debtor died. He was succeeded in the estate by his son who also died before these proceedings began, leaving a minor son, Basava Raja. After the Berikai Zamin was notified and taken over, the Government deposited interim compensation, and the present petitioners, who were the legal representatives of the decree-holder in O.S. No. 59 of 1945 who also died meanwhile, filed a petition under section 42 of the Abolition Act for the payment to them of the amount payable under the decree. This was O.P. No. 512 on the file of the Estates Abolition Tribunal, Chittoor and was filed on 7th November, 1951. As respondents to this application, however, the petitioners impleaded only Lalitha Ammani, the widow of the previous proprietor, who had only a maintenance claim against the Estate. When notice went to her, she raised an objection that her minor son was the proprietor, and that the claim if at all had to be made against him. Thereafter, the petitioners filed I.A. No. 84 of 1954 before the Abolition Tribunal, Vellore, to which these proceedings were transferred from the Abolition Tribunal, Chittoor, and on being impleaded, the minor second respondent raised an objection, that the claim as against him and as made in the application was barred by limitation. The Tribunal, on the pleadings before it, raised an issue in relation to the plea of limitation and this was issue No. 4. The Tribunal held that the application was within time as against the minor second respondent thereto and directed payment to the present petitioners as creditors. It was the correctness of this decision of the Tribunal that was challenged before us in S.T.A. No. 137 of 1954.

The Tribunal had themselves held that on the decisions of this Court, to which it is unnecessary to refer at this stage, Article 120 of the Limitation Act was applicable to the case, and that the application had to be made within six years from the date of the cause of action for the institution of a suit. The Tribunal further held that the cause of action for the suit for a declaration would have arisen on 30th June, 1946, when the previous judgment-debtor died and that therefore the petitioners could file such a suit for a declaration on or before 30th June, 1952. They treated the O.P. No. 512 of 1952 filed on 7th November, 1951, was within time, notwithstanding the fact that the real legal representative, the second respondent in the application, had not been made a party to that petition and he was impleaded only after the order in I.A. No. 84 of 1954.

The point urged before us by the learned counsel for appellant was, whether the Tribunal having held (1) that the Indian Limitation Act, 1908, applied to a petition filed under section 42; (2) that the relevant Article under the Limitation Act, governing the present claim, was Article 120; (3) and the starting point of time for the purpose of that Article would be 30th June, 1946, was right in holding that the petition before it should be deemed to have been filed on 7th November, 1951, when the original O.P. was filed, or whether it should have held that the application should be deemed to have been filed only on February, 1954, when as a result of the order in I.A. No. 84 of 1954 the amendment of the original petition was allowed, and the minor 2nd respondent was added.

In our decision we pointed out that the point urged before us in that precise form was not found in the order of the Tribunal, and we therefore examined the original records to satisfy ourselves as to the true state of affairs. After analysing he facts we pointed out.

"There could be no doubt that if the petition were judged with reference to Article 22 of the Limitation Act it was out of time so far as the second appellant was concerned."

This would necessarily have led to the allowance of the appeal. Learned counsel for the respondent, however, urged then before us two contentions: The first was that the error in embodying the name of the minor respondent in O.P. No. 512 of 1952 was a mere clerical error. We rejected this contention on an examination of the record. It was the second contention that was urged then that figured largely during the hearing of the review petition, and it is therefore necessary to refer to it a little more fully. We then stated :

"The second ground urged by the learned counsel for the respondents was that under section 42 of the Estates Abolition Act claims of creditors could be preferred to the Tribunals without reference to the question whether they were barred by limitation or not. In other words the argument ran thus : The Indian Limitation Act did not in terms apply to claims preferred to an Abolition Tribunal in that the Abolition Act provided that if a claim to a debt were made within six months of the deposit of the compensation amount as required under section 42 of the Abolition Act the Tribunal was entitled and indeed bound to recognise such a claim and make payment towards it. In this connection learned counsel relied upon section 29 (2) of the Limitation Act "—(which we set out)—" and urged that the period of six months referred to in section 42 of the Abolition Act was a " period of limitation " prescribed by a ' special or local law ' different from ' the period prescribed therefor by the first schedule ' within the meaning of section 29 (2) of the Limitation Act ".

We expressed ourselves wholly unable to accept that argument. In our judgment we observed :

" The only reasonable construction which we can adopt of the provisions of sections 42 to 46 is to hold that if a claim were enforceable under the ordinary law on the date of the petition under section 42, it could be entertained by the Tribunal. Section 42, however, prescribes a further condition for the admissibility of these claims and that is, that the claim has to be made within six months of the date of the deposit ".

We further held that as the claim against the minor second respondent was made after the period of limitation as prescribed by the Indian Limitation Act, the same was out of time and was therefore barred.

It is the correctness of this decision that is challenged in this petition for review. Our decision was rendered on 3rd May, 1957, and the application for review (S.T.P. No. 62 of 1958) was filed on 28th September, 1957. In S.T.P. No. 62 of 1958, as originally filed, the ground for review was that the present petitioners had filed a petition (S.T.P. No. 17 of 1957) for execusing under section 5 of the Indian Limitation Act, the delay in filing O.P. No. 49 of 1953 before the Tribunal, and that by oversight we dismissed S.T.P. No. 17 of 1957 stating that no orders were necessary, while delivering Judgment in S.T.A. No. 137 of 1954. The petitioner submitted in paragraph 14 of the petition for review that " the said S.T.P. No. 17 of 1957 was thus disposed of by mistake or error apparent on the face of the record." The proceeding, of which review was sought, was therefore, really not so much S.T.A. No. 137 of 1954 but rather the order dismissing S.T.P. No. 17 of 1957, which had been filed in this Court to excuse the delay in filing O.P. No. 512 of 1952 (later numbered as O.P. No. 49 of 1953 after the proceedings were transferred to the Estates Abolition Tribunal, Vellore). Notice was issued to the respondent on this petition, but at the stage of the hearing, the contention of the learned counsel for the petitioner related not to the supposed error in the order dismissing S.T.P. No. 17 of 1957, but rather to the correctness of our decision in S.T.A. No. 137 of 1954. In view of this, we directed the petitioner to file a formal application to raise additional grounds in the petition for review, S.T.P. No. 62 of 1958, and in compliance with our direction, S.T.P. No. 74 of 1959 was filed. The point raised in this petition for leave to raise additional grounds was that section 22 of the Indian Limitation Act did not apply to proceedings under Madras Act XXVI of 1948, for the reason that section 22 on its language applied only to suits and not to applications and was besides not one of the sections made applicable to proceedings under the Abolition Act by Rules made under section 67 (2) (*e*) of the Act. As indicated earlier, at the hearing of the review petition, the only points argued by the learned counsel for the petitioner were those set out in S.T.P. No. 74 of 1959.

Before, however, dealing with the merits of this contention, it is necessary to refer to a preliminary objection raised by the learned counsel for the respondent,

that no review lay against an order passed by the Court hearing an appeal under section 51 of the Abolition Act. From the orders of the Abolition Tribunals, determining *inter alia* claims of creditors such as the petitioner in this review petition, an appeal is provided to " a Special Tribunal " to be constituted by two Judges of the High Court nominated from time to time by the Chief Justice in this behalf. The Special Tribunal thus constituted by the Judges nominated by the Chief Justice was vested with jurisdiction as *personae designatae* under the terms of section 51. It is therefore necessary to set out the relevant portion of section 51 to appreciate this contention. Section 51 ran, to quote only the relevant words :—

" 51. (1) Any person deeming himself aggrieved by any decision of the Tribunal under section 43 to 50 may, within three months from the date of such decision or such further time as a Judge of the High Court nominated for the purpose by the Chief Justice may in his discretion allow, appeal to a Special Tribunal consisting of two Judges of the High Court nominated from time to time by the Chief Justice in that behalf.

* * * * * *

(2) The members of the Special Tribunal shall hear the case as *personae designatae*, and on all points, whether of law or of fact, on which they are agreed in their opinion, their decision shall be final. Where on any such point or points, the members are divided in their opinion, they shall state the point or points on which they are so divided, and such point or points, together with their opinions thereon, shall then be laid before one or more Judges nominated for the purpose by the Chief Justice, and such Judge or Judges shall hear the case as *persona designata* or as a *personæ designatæ* in so far as it relates to such point or points, and on each such point, the decision of the majority of the Judges who have heard the case, including those who first heard it shall be final ".

Section 67 of the Act enables the State Government to make Rules providing *inter alia* for—

" (*b*) the procedure to be followed by the Tribunals, Special Tribunal, authorities and officers appointed, or having jurisdiction, under this Act ;" and

" (*e*) the application of the provisions of the Code of Civil Procedure, 1908, to applications, appeals and proceedings under this Act ".

In exercise of the rule making powers thus conferred by the State Government, the following rules had been passed on 17th January, 1950, which were in force on the date relevant to this petition :

" 1. Every Tribunal, constituted under section 8 (1) and every Special Tribunal constituted under section 51 (1) of the Act shall have all the powers exercisable by a Civil Court in the trial of suits and in appeals.

2. The proceedings of a Tribunal shall be summary and shall be governed as far as practicable by the provisions of the Code of Civil Procedure, 1908, particularly in regard to—

(*a*) the issue and service of summons :

(*b*) the examination of parties and witnesses ;

(*c*) the production of documents ;

the payment of compensation or any other money to one person on behalf of another under disability and in particular to a guardian on behalf of a minor ; and

(*d*) the passing of orders ".

Based on these the argument of the learned counsel for the respondent was that we were constituted a Special Tribunal under section 51 (1) by reason of our having been nominated by the Chief Justice, and were acting not as Judges of the High Court, to whom the provisions of Order 47 of the Code of Civil Procedure apply, but were functioning as *personae designatae* and that our *powers and jurisdiction* were restricted to those expressly conferred upon us by the Act read with the Rules.

There is no doubt that the power to review, just like a right of appeal, is wholly statutory, and unless there was a specific statutory provision conferring on us the Jurisdiction to review, we would have no power to interfere with the judgments rendered by us in S.T.A. No. 137 to 1954 to which was imparted a finality by reason of the express statutory provision contained in the concluding portion of section 51 (2). Learned counsel urged that the Rules which conferred on the Special Tribunal the powers of a Civil Court enabled as to exercise the powers conferred on Courts under Order 41 of the Code but not a power of review which is a separate and independent head of power and jurisdiction. There are weighty arguments and we must say that they have not been met by the learned counsel for the petitioner. In view, however, of the conclusion that we have reached on the merits of the petition, we did not desire to rest our decision adverse to the petitioner on this preliminary objection to our jurisdiction.

We shall now proceed to consider the additional grounds raised in S.T.P. No. 62 of 1958. Mr. Gopalaswami Iyengar who appeared for the review petitioner rested his submission on a very narrow ground. We have already adverted to the terms of section 67 (2) of the Act, under which the State Government is vested with power to make Rules providing for the application of the provisions of the Code of Civil Procedure and the Limitation Act to applications, appeals and proceedings under the Act. In exercise of this rule making power, the following rule had been made and published in the *Fort St. George, Gazette* dated 17th October, 1950:—

"The provisions of sections 4, 5, 12 (1) and (2), 17 (1) (2) and 18 of the Indian Limitation Act, 1908 (Central Act IX of 1908), shall apply to all proceedings under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), or under the Rules thereunder, before the Tribunals, Special Tribunals, authorities and officers having jurisdiction under the latter Act :

Provided that section 5 of the Indian Limitation Act, 1908 (Central Act IX of 1908), shall not apply to the proceedings under sections 10 (3) and 51 (1) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948)."

The contention of Mr. Gopalaswami Iyengar was that section 22 of the Indian Limitation Act was not one of the sections enumerated in this rule, and that therefore, our judgment in S.T.A. No. 137 of 1954, based on the applicability of section 22 to determine the period of limitation within which the claim of the petitioner could have been filed, was erroneous. We find ourselves wholly unable to accept this argument, which proceeds upon a misapprehension of the scope of this rule. Mr. Gopalaswami Iyengar did not challenge the correctness of the basis of our judgment, that Article 120 of the Limitation Act applied to determine the period of limitation within which the petitioner's claim could be made. If Article 120 of the First Schedule of the Limitation Act applied, it is clear that sections 3 to 25 of the Limitation Act automatically applied. In this connection, the relevant provision of the Limitation Act that has to be considered is section 29, which enacts :—

"29. (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining in any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law ; and

(*b*) the remaining provisions of this Act shall not apply."

It is only where a special or local law enacts a period of limitation, which varies from or is in substitution of any period prescribed by Schedule I of the Limitation Act, that the question of the applicability of sections 4 to 25 dealing with the computation of limitation and the extension of limitation in particular cases owing to disability, etc., could arise. It is to such cases that section 29 of the Limitation Act applies, and by reason of that provision, where a period of limitation alone is specified in a special or local law without a further provision being made for the computation of limitation or for the exclusion of periods, when for example, a Court is closed, or a person is under a disability, section 29 (2) applies and certain provisions of the Limitation Act apply as ancillary to the computation of limitation prescribed by the special or local law. In the present case, the contention that was urged upon us at the hearing of S.T.A. No. 137 of 1954 was that the period of six months set out in section 42 of the Abolition Act itself constituted a period of limitation. If that contention had prevailed, the argument now put forward based upon the Rules framed under section 67 (2) (*e*) would have relevance and force, but we rejected that argument for the reason that on the scheme of sections 42 to 46 of the Abolition Act, it could not have been the intention to permit the payment out in respect of claims which are long ago barred under the Indian Limitation Act. For instance, section 42 uses the word " Creditor " which would mean a person to whom a debt is due and a debt cannot be said to be due when it is barred by limitation. (Cf. *Hunsraj Gupta* v. *Official Liquidators of Dehra Dun*[1]. Similarly, in section 43, a Tribunal is directed to enquire

1. (1932) 64 M.L.J. 403 : I.L.R. 54 All. 1067 : L.R. 60 I.A. 13. (P.C.)

into the *validity of claims*. Normally speaking, unless a strained and unnatural construction was put upon these words, it would include an investigation into the exigibility and enforceability of that claim at the date of the application. More than all, section 45 (3) enjoins on the Tribunal the duty of directing payments to those who were *lawfully entitled* to have their claims paid. In view of these provisions, we could not entertain any doubt that a debt barred by the Law of Limitation by the application of the First Schedule of the Limitation Act could not be the subject-matter of a claim by a creditor under section 42. As we have already stated Mr. Gopalaswami Iyengar did not in this petition seek to challenge this basic principle which underlay our judgment adverse to the petitioner in S.T.A. No. 137 of 1954. If Article 120 of the First Schedule applied to determine whether the claim was in time, it followed that sections 3 to 25 of the Act also applied. (Cf. *Ram Dutt* v. *Sassoon*[1].)

The question next that arises is the scope of the rule promulgated on 17th October, 1950, which we have extracted earlier. Under section 67 (2) (*e*), the State Government was enabled to make Rules providing for " the application of the Indian Limitation Act to applications, appeals and proceedings under this Act; and the rule must accordingly be read as applicable to such proceedings. It would therefore have relation only to the periods of time set out in the various provisions of the Act or the Rules under which applications, appeals or other proceedings have to be filed before the Tribunal. In other words, it would apply for instance to the six months' period within which after the making of a deposit, the applications under section 42 have been filed and to appeals under sections 15 (2) and 51(1) of the Act and similar proceedings. Where the basic time is prescribed by the Abolition Act, the Rules set out the method of computation of such time and the periods or days which might be excluded in making such computation. The rule cannot have any application to determine the computation of the period of limitation prescribed by the First Schedule of the Limitation Act, which we have held, determines the period of time within which the petitioner's claim could have been made. The rule relied on is therefore wholly inapplicable to determine whether the claim of the petitioner which was brought up before the Tribunal was within time or not under the Indian Limitation Act.

The petition fails and is dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMACHANDRA IYER.

S. Kandaswami .. *Petitioner**

v.

S. B. Adityan .. *Respondent.*

Representation of the People Act (XLIII of 1951), *sections* 83 *and* 90—*Scope and object of—Particulars of correspondence required under—Nature and extent of—Power of Tribunal.*

Section 83 of the Representation of the People Act, 1951, makes a distinction between material facts and particulars in an Election Petition. Where the material facts allged constitute a corrupt practice certain amount of details are required to ensure clearness, the object being to prevent surprise at rhe trial. The function of the particulars is therefore to point out or indicate the nature of the defence expected of the respondent and it cannot mean disclosure of the evidence which the petitioner has to let in.

As particulars of a corrupt practice serve a double purpose of enabling the respondent and the Court to concentrate on the real point in controversy, a power to call for such particulars is necessary and incidental to a fair trial and an Election Tribunal under the Act has such a power. The amendment of section 83 (3) in 1956 does not make any difference as the omission of the original sub-section was only of a surplusage and section 90 (1) of the Act which attracts the provisions of the Civil Procedure Code to the trial of an Election Petition is comprehensive enough to include such a power. Both on principle and on authority the Tribunal has power to order better particulars to be furnished

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1. (1929) L.R. 56 I.A. 128 (P.C.).

*C.R.P. No. 1338 of 1958. 10th October, 1958.

and only in default of furnishing such particulars the Tribunal has jurisdiction to strike off the pleadings. The Tribunal cannot direct the pleadings to be struck off without a prior order directing the furnishing of particulars. What amounts to sufficient particulars or the nature and quantum of particulars to be ordered in each case will vary according to the facts and circumstances of each case. In cases where general corrupt practice of bribery is alleged the particulars cannot be precise as to the date or time or names of all persons bribed as such details cannot be known to a petitioner. A general statement of the character and extent of the corruption alleged would suffice and it is always open in such cases to the respondent to apply for directions regarding further particulars.

Petition under section 115 of Act V of 1908 and Article 227 of the Constitution of India praying the High Court to revise the order of Election Tribunal (District Judge), Tirunelveli, dated 20th August, 1958 and made in I.A. No. 4 of 1958 in E.P. No. 98 of 1957.

The Advocate-General (*V. K. Tiruvenkatachari*), *T. M. Martin* and *R. Guruviah*, for Petitioner.

K. K. Venugopal, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition filed under Article 227 of the Constitution to revise the order of the Election Tribunal, Tirunelveli, in I.A. No. 4 of 1958 in Election Petition No. 98 of 1957. That order directed a striking out of paragraphs IV-A to IV-E of the election petition, except in regard to two instances of the several corrupt practices alleged.

Election Petition No. 98 of 1957 was filed under the Representation of the People Act of 1951 (which will be hereafter referred to as the Act) for a declaration that the election of the respondent, S.B. Adityan to the Madras State Assembly from the Satankulam constituency in Tirunelveli district was void. The election to that constituency was held on 4th March, 1957 and 6th March, 1957. The petitioner and the respondent were two amongst the four candidates, who contested the election. The respondent was declared elected by a majority of about 11,207 votes over his nearest rival the petitioner. On 15th April, 1957, the petitioner filed the election petition referred to above. His case was that the election was liable to be set aside as it was procured by several corrupt practices. The main heads of charge against respondent were that there was bribery of rival and intending candidates and of the voters on a large scale, that there was hiring of vehicles for the use of the voters, that the assistance of the police force was procured in furtherance of the prospects of the election, that there was a publication of false statement against petitioner and that the account of election expenses submitted by the returned candidate was not correct.

A written statement was filed by the respondent on 12th July, 1957, denying the several averments contained in the petition. There was a complaint in the written statement that full particulars of the alleged corrupt practices were not set out in the petition. The respondent also claimed that sub-paragraphs 6 (*b*), 6 (*c*) and 7 of paragraph IV-A should be struck out as lacking in particulars.

Issues were settled on 29th July, 1957. Issue No. 9 ran as follows :—

"Are sub-paragraphs 1 to 7 of paragraph IV-A, paragraphs IV-B, IV-C 1, IV-D and IV-E bad for want of full and necessary particulars."

There was no issue, however, as to whether the petition was liable to be dismissed *in limine* for lack of particulars nor did the respondent insist on issue No. 9 being tried as a preliminary issue.

On 5th August, 1957, the respondent filed I.A. 1 of 1957 for a direction to dismiss the election petition under section 90 (3) of the Act on the ground of failure to implead Muthu and Meganathan, who were candidates, against whom the petitioner in the Election Petition had alleged commission of corrupt practices by way of payment of bribes by the respondent to induce them to withdraw from the contest. After contest the Election Tribunal dismissed that application. Proceedings under Article 226 of the Constitution were thereafter initiated to quash that order but that met with no success. The judgment of this Court in the appli-

cation for writ has been reported in *Adityan* v. *Kandaswami*[1]. The matter was thereafter taken by way of appeal to the Supreme Court, which by its judgment dated 20th May, 1958, affirmed the judgment of this Court. The judgment of the Supreme Court is reported in *Adityan* v. *Kandaswami*[2].

The election petition was thereafter taken up by the Tribunal on 25th July, 1958. It was then adjourned to 11th August, 1958, for evidence. The petitionne is stated to have taken steps for that hearing date, by summoning witnesses and documents. In the meanwhile the respondent took out an application, I.A. No. 4 of 1958 to strike out substantially the entirety of the petition, on the ground that it was devoid of full particulars. That application was posted along with the election petition and was heard on the 11th and the 12th August. On behalf of the petitioner it appears to have been contended that the petition contained all the necessary particulars which the petitioner could possibly give, but that if the Tribunal considered the particulars given as insufficient or defective, he should be given an opportunity to rectify the defect. The Election Commissioner held that the averments in the petition were vague, and declining to grant any opportunity to the petitioner to furnish better particulars directed a striking out of various paragraphs in the petition. The result of that order is that there is very little left in the petition for enquiry. The petitioner seeks to revise that order by the present petition under Article 227 of the Constitution.

Before considering the merits of the revision petition, it is necessary to set out the various charges in the petition which according to the Election Commissioner are vague, justifying the drastic order of being struck out. Paragraph IV of the petition avers that the election of the respondent was void for the reasons stated thereafter, *i.e.*, in paragraphs IV-A to IV-E. Paragraph IV-A comprises of 7 sub-paragraphs. The first four of them comprise specific items of charges under section 123 (1) (*a*) of the Representation of the People Act. Sub-paragraph 1 of paragraph IV-A runs as follows:

"The first respondent and his election agent Sri S. B. Adityan 'bribed' the fourth respondent to retire from the contest at the election, and in pursuance thereof the fourth respondent retired from the contest on 20th February, 1957. The petitioner learns that the first respondent and his election agent promised to pay a substantial sum as gratification to the fourth respondent with the object of inducing him to retire from the contest and that a part of that sum was in fact paid within a few days before or after 20th February, 1957, by the first respondent and his election-agent".

The next charge which is typical of the two succeeding ones runs:

"Sri M.R. Meganathan was candidate for Sattankulam and Tiruchendur Assembly Constituencies at the election. The first respondent and his election agent paid a gift of Rs. 10,000 to induce him to withdraw from being a candidate at the election from Sattankulam Constituency and in pursuance thereof, Sri M. R. Meganathan withdraw his candidature at the election from Sattankulam Constituency."

The Election Commissioner held that the first of the above charges is defective in that the amount of the bribe and the place where is was given were not specified. The defect pointed out in regard to the 2nd and the two charges that followed was that the dates and places of payment of the bribes were not given.

The next set of charges are those under section 123 (1) (*b*) of the Act. Paragraph IV-A (5) contains 5 instances of which the last two relate to treating. It says:

"At the instance and with the consent of the first respondent and his election agent Sri S. T. Adityan gratification in cash were paid, in every village throughout the constituency to the electors with the object of directly inducing them to vote at the election for the first respondent. For instance,

(*a*) Srimathi Selvamani Desikar, wife of Desikar of Mudaloor, a relieving polling agent of the returned candidate at Mudaloor was found in the act of bribing the voters with the money provided by the first respondent, near the polling booth at Mudaloor, on 4th March, 1957. This was brought to the notice of the Presiding Officer of the Polling Station by Sri Peter Nadar and Sri Poornaraj, both of Mudaloor".

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1. (1958) 1 M.L.J. 61 : I.L.R. 1958 Mad. 279.
2. (1958) S.C.J. 1072 : (1958) 2 An.W.R. (S.C.) 187 : 1958 M.L.J. Crl. 844 : 2 M.L.J. (S.C.) 187 : A.I.R. 1957 S.C. 857.

The two instances that followed were similar in nature and relate to the payment of gratification in the shape of money to voters at Peria Kandan Vadali and Samithope. The two further instances relate to bribery by treating, one of them being:

" At Periya Thalai, Sri Francis Fernando, agent of the returned candidate was actively inducing the voters to vote for the returned candidate by giving the voters chits on 4th March, 1957, which enabled the voters to get entertainments in the shape of food at the hotels of Periya Thalai. The cost of the entertainments was met by the returned candidate."

A similar one followed with respect to the Sattankulam village. The names of the hotels where voters were fed at the cost of the candidate, and dates were given. In regard to all these instances of bribery and treating, the Election Commissioner was of the view that inasmuch as the names of the voters bribed and the amount of bribe were not specified, they should be held to be vague.

Para IV-A (6) stated:

" According to the specific arrangement made by the returned candidate and his election agent Sri S. T. Adityan his agents paid money throughout the constituency to such of the voters, in every village, who were willing to go to the booths, secure their ballot papers but actually refrain from voting and smuggle the ballot papers to the man in the confidence of the returned candidate ballot papers so smuggled out of the polling booth by the voters who refrained from voting were then smuggled back into the booth by voters employed by the returned candidate."

Three instances were given in the village of Sundankottai and Vijayaramapuram. In regard to one of them *viz.*, paragraph IV-A (6) (*a*) the Election Commissioner held the charge to be sufficiently specific. But he held the other two as vague. Sub-paragraph 6 (*b*) which can be stated to be similar to the next one, runs:

" At about the same time and place on the same day the same agents of the returned candidate paid Rs. 2 each to several voters to secure the ballot papers and refrain from voting and an additional amount of Rs. 3 each for delivery of the ballot papers smuggled out of the booth to them".

The criticism in regard to these were that the names of the persons bribed were not given.

Paragraph IV-A (7) states:

" The returned candidate and his election agent arranged through their agents for the payment of money in every village in the Constituency to induce voters to vote for the first respondent and in pursuance thereof money was paid to several voters in every village ".

This is no doubt vague and it was so held.

Paragraph IV-B charged the respondent with a corrupt practice coming within section 123 (5) of the Act. If specified the motor vehicles, which were alleged to have been hired for the carriage of voters, with reference to their registration numbers, and also particularised two villages amongst others where they were used. This was held to be insufficient in that the names of the voters who were conveyed by the vehicles were not given.

Paragraph IV-C relates to a charge within section 123 (4) of the Act, publication of false statement by or on behalf of respondents by agents of the petitioner. Two instances were set out *viz.*, notices in Tamil printed at Kumaran Press and Nehru Press, Colombo. The complaint against those averments is not that any particular notice was missing but that the notices themselves were not produced.

Paragraph IV-D related to a charge under section 123 (7) and it says:

" The first respondent had also procured or obtained the assistance of members of the Police force for the furtherance of the prospects of his election. For instance—in Magnahapuram on 4th March, 1957, a Police constable was found in the act of asking the voters to vote for the first respondent and a report thereof has been made to the concerned authorities."

This was held vague as the names of the Police constable and the voter tampered with were not given.

Paragraph IV-E relates to a corrupt practice under section 123 (6) of the Act. It referred to the non-compliance with the provisions of the Act, in that proper accounts were not submitted for the election expenses. That too was characterised

as vague. The averments in that paragraph depended upon the petitioner making out his case in the other paragraphs. If moneys were expended in the manner alleged by the petitioner in the earlier paragraphs, the accounts would undoubtedly be inccurate. The result of these findings was that except in regard to two instances, all the other charges were found to be vague. The Election Commissioner held that he had no power to direct better particulars, the only power of the Tribunal according to him being to strike out the defective charges; and he did so.

It is, therefore, necessary to consider the object for which particulars are required in election petition and the power of the Tribunal when it finds the particulars given are defective or insufficient.

Section 83 (1) of the Act says :

" An election petition (*a*) shall contain a concise statement of the material facts on which the petitioner relies; (*b*) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice and (*c*) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings ".

The section makes a distinction between material facts and particulars. Material facts are those, which will go to make out the petitioner's case from the charge against the respondent. If the material facts constitute a corrupt practice certain amount of detail would be necessary to ensure clearness. The object of insisting on such details or particulars is to prevent surprise at the trial as otherwise the respondent could not know for certain what is the real point in dispute. The function of the particulars is therefore to point out or indicate the nature of the defence expected of the respondent. It cannot however mean a disclosure of the evidence which the petitioner has to let in.

Rogers on Election, dealing with this subject in Vol. 2, page 191, states :

" A respondent is further entitled to full particulars of the charges specifically made in the petition, or in the above mentioned particulars. The particulars ordered in each case will vary according to the circumstances."

In 14 *Halsbury's Laws of England* (Simonds Edition), at page 276, it is stated:

" Such particulars as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effectual trial may be ordered by the Court or a Judge in the same way as in ordinary proceedings in the Queen's Bench Division, and upon such terms as to costs and otherwise as may be ordered. Where the allegations in the petition itself are quite general it is the practice to order immediately particulars of the nature of the alleged offences. Further particulars will be ordered of the circumstances of each charge, the order usually directing the petitioner to furnish particulars of the names of the different persons, in regard to whom the offences are alleged to have been committed, together with their addresses and numbers on the register, or, failing that their occupation. Similarly particulars are ordered of persons, by whom the offences are alleged to have been committed, as also of the time and place of the commission of each offence and of its precise character, and, in the case of charges of bribery or treating, of its degree, will be ordered."

In my view particulars should serve a double purpose. Primarily perphaps it should be for the benefit of the respondent to enable him to know what exactly he has got to meet. It would also be necessary for the purpose of enabling the Court to exclude irrelevant matters and concentrate upon the real point in controversy. A power to call for particulars in respect of any pleading would, therefore, be necessary for and incident to a fair trial. In *Bikaji* v. *Brijlal*[1], the existence of such a power in the Tribunal was recognised.

Mr. M. K. Nambiar, the learned counsel appearing on behalf of the respondent contended that after th amendment of the Repr[illegible]ntation of the People Act of 1951 by Act XXVII of 1956, the Tribunal would have no power to grant any application for particulars, and that unless the petitioner in an election petition himself got amended the petition by furnishing the necessary particulars, the petition had to fail for vagueness. In this connection the learned counsel referred to the provisions

1. (1955) 2 M.L.J. (S.C.) 154 : (1955) S.C.J. 658 : (1955) 2 S.C.R. 428 (S.C.).

of section 83 (3) in the Act of 1951 prior to its amendment in 1956 which enabled the Tribunal to direct or allow particulars or better particulars. That provision was repealed by Act XXVII of 1956 and in its place section 90 (5) was enacted. Section 90 (5) states :

> " The Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

According to the learned counsel section 90 (5) only gives a power to allow particulars and not to direct them. In this connection he referred to the decision in *Cubison* v. *Mayo*[1], where a question as to the interpretation of section 118 of the County Courts Act, arose. That section stated that a Solicitor could recover from his client ' only costs incurred in any County Court allowed on taxation '. It was held that the word ' allowed ' meant ' allowed on an application '.

The decision reported in *Kamath* v. *Election Tribunal*[2], supports the contention of the learned counsel for the respondent. That decision has been later affirmed by a Full Bench of the same Court in *Babulal* v. *Brij Narayan*[3]. I am, however, unable to accept that contention. As stated already, the power to call for particulars or further particulars in regard to allegations or corrupt practice is one for the benefit of the respondent and sometimes a necessary incident to achieving a fair and effective trial. On principle there can be no justification for the contention that while the petitioner could furnish particulars at any time, the respondent could have no corresponding right to call for them especially when particulars are intended only for his benefit. The remedy of the striking out the petition for vagueness may not always be available.

In *Kamath* v. *Election Tribunal*[2] it was held that the omission of the words " order such further or better particulars " while re-enacting section 83 (3) as 90 (5) showed an intention in the Legislature to do away with that power of the Court. Reference was made to the rule of interpretation laid down in *Fraser* v. *Minister for National Revenue*[4], *viz.*, that when a Legislature amends an Act by deleting something which was there, then in the absence of an intention to the contrary the deletion should be taken to be deliberate. That rule could not, however, apply as in my opinion what was omitted while re-enacting section 83 (2) was only a surplusage. Under section 90 (5) there is a power to allow particulars for a fair and effective trial those words are wide enough to cover a power to order particulars of an opponent's pleading. Further section 90 (1) of the Act states " that every election petition shall be tried as nearly as may be in accordance with the Code of Civil Procedure. Order 6, rule 5, Civil Procedure Code, states,

> " A further and better statement of the nature of the claim or defence or further and better particulars of any matter in any pleading may in all cases be ordered, upon such terms as to costs and otherwise as may be just ".

If Order 6, rule 5, Civil Procedure Code, is taken to regulate the trial of election petitions by virtue of section 90 (1) there would be really no need for any special power under the Act to direct particulars and the deletion of the clause in section 83 (3) when it was re-enacted in section 90 (5) would have no significance.

In *Harischandra* v. *Triloki Singh*[5], it was held that the provisions of the Civil Procedure Code would apply to the trial of election petition. Even if section 90 (5) is construed as taking away the power of the tribunal to direct particulars, it could not be so read as to impliedly take away the rules of procedure made applicable by section 90 (1). It has now been settled that an election petition can be amended as under Order 6, rule 17, Civil Procedure Code. But as pointed out in *Harischandra* v. *Triloki Singh*[5], such powers of amendment are limited. An amendment may include the introduction of a new or additional instance of a corrupt practice

1. 1896 Q.B. 246.
2. A.I.R. 1958 M.P. 168.
3. A.I.R. 1958 M.P. 175.
4. 1949 A.C. 24.
5. (1957) S.C.J. 297 : 1957 S.C.R. 370.

pleaded and specified. But particulars are for amplifying or for furnishing details of an instance of corrupt practice alrady pleaded. It stands to reason that the Tribunal should be more liberal and have greater power in the matter of granting particulars than in allowing amendments. The Legislature evidently intended to make the provision in regard to the amendment of particulars by way of abundant caution to avoid contentions like limitation, etc. Section 90 (5) provided, therefore, for the petitioner amending the particulars at any time. That provision cannot be construed as in any way limiting the provisions of section 90 (1) which rendered the provisions of the Civil Procedure Code applicable to the trial of election petitions. In a recent judgment of the Supreme Court in *Basappa* v. *Ayyappa*[1], the distinction between procedure for trial and power possessed by the Tribunal has been pointed out. The provision of section 90 has been held to relate to procedure for the trial of election petitions. It would, therefore, follow that the application for and directing particulars of an opponent's pleading would be governed by the provisions of the Civil Procedure and not only by reason of the power-granted by section 83 (3) or section 90 (5) which has taken its place.

In *Bikaji* v. *Brijlal*[2], the Supreme Court recognised a power in the Tribunal to direct particulars of a corrupt practice. Mr. Nambiar contends that the decision would not apply after the repeal of section 83 (3). I am unable to agree with that contention. The right of a party to obtain particulars of an opponent's pleading is an incident of fair trial and cannot be deemed to be taken away by implication.

If Mr. Nambiar's contention that a Tribunal would have no power to direct an amendment of particulars of a corrupt practice were accepted, there would equally be no power in the Tribunal to strike out the corrupt practice alleged as no provision is made in the Act for that contingency. But to justify the order of the Election Tribunal he relied on a passage in 14, Halsbury's Laws of England, page 492, Vol. 2, of Rogers on Election, page 191, and the decision in *Bhikaji* v. *Brijlal*[2]. The authorities relied on recognise a power in the Tribunal to strike out in a case where there has been a default in complying with a previous order directing particulars. The learned counsel also relied on *Kamath* v. *Election Tribunal*[3]. The authorities relied on recognise a power in the Tribunal to strike out in a case where there has been a default in complying with a previous order directing particulars. The learned counsel also relied on *Kamath* v. *Election Tribunal*[3]. In that case it was held that on the terms of section 90 (5) there would be no power in an election Tribunal to direct the furnishing of particulars in respect of an opponent's pleadings, and that there would be equally no power to strike out the pleading for default of furnishing particulars if directed. The learned Judges also held that material facts in a pleading could not be struck out. They, however, held that it was open to the Tribunal when it finds that the particulars given in a petition were insufficient for trial.

The distinction between a material fact and particulars has been stated in *Bruce* v. *Odhams*[4], material fact is stated to mean what is necessary for the purpose of formulating a complete cause of action, the failure to plead which would render the pleading to be struck out under the English Rules of Practice ; whereas the function of the particulars is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on guard as to the case he has to meet and to enable him to prepare for trial. In the latter case the pleading could not be struck out as disclosing no cause of action, but if an order for particulars is made and not complied with, that penalty could be imposed for disobedience. Under Order 14, rule 1, Civil Procedure Code, an issue arises when a material fact is affirmed by one party and denied by the other. If, therefore, it is held that the material facts in an election petition could not be struck out, the issue would still be there notwithstanding that the particulars were defective. There being no question of issue arising as a result of particulars stated, the issue being only in regard to the material fact, the petition could not be disposed of on the ground that no issue arises. The trial would

1. C. A. No. 76 of 1958.
2. (1955) 2 M.L.J. (S.C.) 154 : (1955) S.C.J. 658 : (1955) 2 S.C.R. 428 (S.C.).
3. A.I.R. 1958 M.P. 168.
4. (1936) 1 K.B. 697, 712.

have to be proceeded with even if full particulars are not furnished. This would lead to great inconvenience to the Tribunal and hardship to the respondent. I would, therefore, hold that both on authority and on principle, there is a power in the Tribunal to order better particulars and in default of compliance with that order to strike out the pleadings and that the view of the Election Tribunal to the contrary is wrong. Therefore, if the respondent felt, or the Tribunal found that the petition was defective for want of any particulars, the petitioner should have been directed to furnish the same within a specified time. There would be no jurisdiction in the Tribunal to strike out the pleadings when there has been no previous order directing the furnishing of particulars.

Apart from that consideration, I am of opinion that in the instant case, the particulars furnished are sufficient except in one or two instances. Section 83 (1) (*b*) states that the election petition shall set forth full particulars of any corrupt practice including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The particulars would necessarily vary according to the nature of the corrupt practice alleged in the petition. When a particular corrupt practice is stated to have been committed, the fullness of the particulars may, to some extent, depend on the nature of the corrupt practice. The section itself contemplates that particulars regarding names, etc., should be specified only as far as possible. In particular circumstances, it may not be possible to furnish some of those particulars enumerated in section 83 (1). If the rule is that the names, dates and place of commission of the corrupt practice should be given in all cases, several of the election offence which would be committed in secret could never come before the Tribunal and the purity of the elections could not be maintained. I have already referred to a passage in Vol. 2 of *Rogers on Elections*, page 191, where it is stated that particulars to be ordered will vary with the circumstances.

The learned counsel for the respondent relies upon the decision in *Bhuvanesh Bhusan* v. *Election Tribunal*[1], in support of his contention that under section 83 of the Act in giving full particulars there must be at least the bare minimum of three particulars, namely, the names of the parties, who committed the corrupt practices, the date and place of the commission of the corrupt practices.

Reference was next made to the decision in *Bikaji* v. *Brijlal*[2]. At page 441 the Supreme Court held after referring to section 83 (2) that the particulars should depend on the nature of the allegations and that the requirement of full particulars is one that has got to be complied with, with sufficient fullness and clarification, so as to prevent the enquiry from being turned into a rambling and roving inquisition.

In the instant case the charges made against the respondent have been already set out. The first portion of the charges, set out in para. IV-A, namely, items 1 to 4 relate to bribery of a person to stand or not to stand as a candidate. The substantial contention on behalf of the respondent is that the date of giving of the bribe has not been given. A bribe would nonetheless be a bribe whether it is paid on one day or another. The necessity for fixing the time is generally to find out whether it had influenced the recipient in doing what he did. This has been pointed out in *Parker's Election Agent and Returning Officer*, 5th edition, at page 291. It states,

> "The time at which a corrupt act is done, is not, as a matter of law, and except as regards the evidence necessary to prove the offence material, provided it is done at a time when it is operative on the election. The section is expressed in very general terms, and does not specify any limitation of time. It has been held that if the corrupt act be committed before the election with a view to influence a voter at the coming election, whether it is one, two, or even six years before, it is just as much bribery as if it were committed on the day before, or the day of, the election. But the bribe must be operative at the time of the election, and if it were given long before, and the person bribed died before the election took place, or both the briber and the person bribed repented and the latter returned the bribe, it will not affect the seat, though it may subject the parties to penalties".

Again at page 292—

> "But with reference to the evidence required, time is, however, material. It is obvious that where a considerable time intervenes between the bribe and the election, the difficulty of proof is much

1. A.I.R. 1958 All. 587.
2. 1955 S.C.J. 658: (1955) 2 M.L.J. (S.C.) 154: (1955) 2 S.C.R. 428 (S.C.).

increased. If the act of bribery is committed shortly before voter has voted, the act will be assumed to be bribery until the contrary is shown and no further proof of any corrupt intent is requisite".

The charges in the present case are that the bribes were offered at or about the time of election. The charge being that the respondent and his election agent paid the bribes, the allegation if true would be a matter within the exclusive knowledge of the respondent. In my opinion, it would be putting too great a burden upon the petitioner in such cases to expect him to specify a matter which would have been done in secret. To expect the petitioner to give out the date of the payment of bribe is expecting him to do an almost impossible thing as very rarely bribes would be given openly.

As regards the money paid in the various villages the charge is of a general nature. In the petition sufficient particulars have been given as to who distributed the bribes. In 14, Halsbury's Laws of England, at page 278, it is stated,

"Where a charge of general corruption is made, the particulars which are ordered are necessarily wider, and the names of particular persons alleged to have been bribed or treated will not be ordered. A petitioner will, however, be ordered to specify the character and extent of the corruption alleged.'

Applying that standard, I am of opinion that the allegations in para. IV-A (5); and (6) are sufficiently specific to satisfy the requirements of section 83 (1) (*b*). It is true that para. IV-A (7) is vague, but the remedy of the respondent would be to apply for directions for particulars, and not for striking out the paragraph.

In the matter of the alleged hiring of vehicles, details as to the actual Registration numbers of the vehicles utilised and also the villages in which they were used have been given. In a matter where large number of voters are taken from those villages, it would be almost impossible to give their names. The principle of the cases in regard to general charge of bribery would, in my opinion, also apply to this corrupt practice. I am of opinion that there is no justification for striking out that paragraph IV-A (8).

In paragraph IV-D it has been stated that report of the policeman's interference in the election has been made to the concerned authorities. Though the allegations in the paragraph can be characterised as vague, there is some definiteness in regard to it in that a report of the incident is stated to have been made to the authorities concerned. In my opinion, this is a matter for the respondent (if he feels the necessity) to require the petitioner to furnish better particulars as to whom the report was made, or from whom the name of the constable and other matters could be found out.

As regards the averments in paragraph IV-C I am of opinion that the non-furnishing of the printed leaflet is not a particular, since particulars are given of the false statement already in the petition and the printed leaflets alleged to have been issued are only evidence of the statements.

The contention as to para. IV-E of the petition is that the petitioner had an opportunity to go through the accounts produced by the respondent. What is complained is that the various bribes and other expenses adverted to in the earlier paragraphs of the petition were not shown in the accounts, and that therefore the statement of account is wrong. That could not be found out by reference to the existing accounts. That paragraph, therefore, depends upon the petitioner proving the earlier statements. The respondent could only show that on the allegations no charge is made out. That however is not the case.

I am, therefore, of opinion that except in regard to paragraph IV-A (7) and IV-D, the petitioner has set out the particulars as best as he could under the circumstances. In regard to paras. IV-A (7) and IV-D, the responsent may if he choose demand particulars. There is however no justification for the Tribunal to have struck out the various paragraphs in the election petition referred to above. Such an order is without jurisdiction and is liable to be revised by this Court under Article 227 of the Constitution. The order is set aside and the Election Commissioner is directed to proceed with the enquiry into the election petition with the petition as it stood before the order, in accordance with law. The petitioner will be entitled to his costs from the Respondent.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The Madras Pencil Factory, by its proprietors, V. Perumal Chetty & Sons by its partner V. Ananthakrishna Chetty .. *Petitioner**

v.

The Regional Provident Fund Commissioner, 111, Mount Road, Madras-6 .. *Respondent.*

Employees Provident Fund Act (XIX of 1952), section 1 (3)—'In which 50 or more persons are employed'—Words refer only to factory and not to industry—Industry specified in Schedule I of the Act—'Engaged' in section 1 (3)—What constitutes.

The petitioners run a pencil factory in which about 140 persons are employed. The factory utilizes imported machinery and attached to the factory is a foundry and a workshop in which certain spare parts required for the use of the machinery are fabricated. The number of persons employed in this workshop and foundry is 23. On the question whether the factory comes within the scope of the Act,

Held : The words 'fifty or more persons' occurring in section 1 (3) of the Act refer to factory and not to the industry. The amendment of the section by Act XCIV of 1956 makes this clear.

The factory must be engaged in one of the industries specified in Schedule I of the Act and that must be the primary activity.

If with a view to carry out its primary activity it is incidentally engaged in something else it will not alter its primary character.

The word 'engaged' in section 1 (3) of the Act refers to the primary activity of the factory.

The factory run by the petitioners is not engaged in any industry specified in Schedule I of the Act and the Act does not apply to it.

Case-law discussed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* restraing the respondent from enforcing his orders calling for the records in No. D.MD. 551, Regional; dated 28th November, 1956, 29th December, 1956 and 6th March, 1957 and quash the orders dated 28th November, 1956, 29th December, 1956, and 6th May, 1957 and made therein.

P. Govinda Nair, for *M/s. King and Partridge*, for Petitioner.

R. G. Rajan and The Government Pleader (*B. V. Viswanatha Aiyer*), for Respondent.

The Court made the following

ORDER.—This is a petition for the issue of an appropriate writ to restrain the Regional Provident Fund Commissionr from enforcing his orders dated 28th November, 1956, 29th December, 1956, and 6th March, 1957. The relevant facts are these. The petitioners are the firm of V. Perumal Chetty & Sons. They run a pencil factory in Madras, in which according to one part of the record 114 people and according to another part of the record 140 people are employed. The factory utilises imported machinery, and attached to the factory is a foundry and a workshop in which certain spare parts required for the use of the machinery are fabricated. The number of persons employed in this workshop and foundry is 23.

On 28th November, 1956, the Regional Provident Fund Commissioner wrote to the petitioners,

"Your factory comes under the purview of the Employees Provident Funds Act, 1952 and the Scheme framed thereunder from 1st November, 1952 as it is engaged in the manufacture of "General Engineering Products" one of the industries mentioned in Schedule I to the Employees' Provident Funds Act, 1952, has completed three years from the date of commencement of production on the 6th October, 1952 and has employed fifty or more persons on the 6th October, 1952".

He then called upon them to submit various returns and make various remittances. On 20th December, 1956, the petitioners replied that their factory did not

* W.P. No. 249 of 1957. 24th September, 1958.

fall under the Employees Provident Funds Act. On 29th December, 1956, the Commissioner wrote to the petitioners,

"With reference to your letter cited you are informed that section 1 (3) of the Employees Provident Fund Act provides that the Act applies to all factories engaged in any industry specified in Schedule I in which 50 or more persons are employed. The words 'in which 50 or more persons are employed' have reference to the word 'factory' and not to 'industry'. Therefore even though the number of workers engaged in a schedule industry in factory may be less than 50, the Act will apply to the factory if in the factory as a whole 50 workers or more are employed. It is the total employment, as a strength of the factory as a unit on the crucial date, *viz.*, 6th October, 1952, which is material and not the employment strength of a section engaged in the Scheduled Industry."

On 18th January, 1957, the petitioners again wrote to the Regional Provident Fund Commissioner to which on 6th March, 1957, he sent a reply requiring the petitioners to comply with the instructions already issued. In paragraph 4 of this letter, the Commissioner stated :

"It is brought to your notice that by not implementing the Emplyoyees Provident Fund Scheme, 1952, so far in your factory you have violated the mandatory provisions of the Employees Provident Fund Act, 1952 and the scheme and have thus rendered yourself liable for prosecution under section 14 of the Act and paragraph 76 (*a*), (*c*) and (*e*) of the Employees Provident Fund Scheme 1952. If you do not implement the scheme within a week of receipt of this notice, you are hereby informed and please take notice that penal action under the Provisions of the Act and the scheme quoted above will be taken against you without any further intimation to you."

In view of this, the petitioners filed the present writ petition on 15th March, 1957. They also applied for an interim injunction in C.M.P. No. 2311 of 1957; and on 15th April, 1958, Rajagopalan, J., granted the interim injunction prayed for. Section 19 (*a*) of the Employees Provident Funds Act of 1952 provides that

"if any debt arises as to (i) whether a factory is engaged in any industry specified in schedule I : or (ii) whether 50 or more persons are employed in factory......the Central Government may by order make such provision or give such direction....as appear to it to be necessary, or expedient for the removal of the doubt or difficulty...."

The section also provides that the order of the Central Government in such a case shall be final. In view of this the petitioners wrote to the Government of India to which they received the reply, that their application would be considered after the Writ Petition they had filed in this Court has been disposed of by this Court.

The question is whether the Employees Provident Funds Act of 1952 applies to the factory of the petitioners.

Omitting the portions that are not material here, sub-section (3) of section 1 of the Act originally ran as follows :

"Subject to the provisions contained in section 16, it applies in the first instance to all factories engaged in any industry specified in Schedule I in which fifty or more persons are employed."

Central Act No. 94 of 1956 re-enacted the section as shown below : (here too I am quoting only the material portion);

"Subject to the provisions contained in section 16, it applies (*a*) to every establishment which is a factory engaged in any industry specified in Schedule I *and* in which fifty or more persons are employed ...."

The amendment made three changes: (i) the words 'in the first instance' were taken out ; (ii) instead of the words 'all factories' the expression 'every establishment which is a factory' was substituted ; and (iii) the word 'and' was inserted between the words 'Schedule I' and "in which 50 or more persons are employed". For the purpose of the present case the first two changes are not important but the third one is.

The argument of the learned advocate for the petitioners may be thus summarised. Schedule I includescement, cigarettes and 'electrical, mechanical or general engineering products'. That schedule, however, does not include pencils. The making of spare parts for machines with the aid of which pencils are manufactured will no doubt fall within the heading 'engineering products'.

But the petitioners are not employing fifty persons in making such engineering products. The expression 50 or more persons' used in sub-section (3) of section 1

as it stood before it was amended relates to 'industry' and not to the word 'factories'. Unless therefore, it can be shown that the petitioners have been employing fifty or more persons in that section 20 of their factory which is engaged in manufacturing engineering products, that factory will not come within the scope of the section.

To this the learned Government Pleader replied : The expression 'fifty or more persons' relates not to the word 'industry' but to the word 'factories'. Therefore, if any, engineering product is manufactured in any part of a factory it is of no consequence whether the number of persons engaged in such manufacture is less than 50. If the total number of persons employed in the factory including the number of persons employed in manufacturing an "engineering product" amounts to 50 or more, then the provisions of the Act would apply.

I shall now refer to some of the decisions cited before me.

One of these is that of the Bombay High Court in *Oudh Sugar Mills, Ltd.* v. *Regional Provident Fund Commissioner, Bombay*[1]. The material facts there were as follows: The petitioner was a public limited company registered under the Indian Companies Act. It carried on the business of manufacturing hydrogenated vegetable oil and its by-products, such as soap and oil cake. The oil used to be marketed in tin containers of various sizes. Such containers were fabricated by the company in the precincts of the oil factory. The containers were used only for the purpose of packing vegetable oil and for no other purpose. 31 persons were employed in manufacturing these tin containers. 211 workers were employed in the other parts of the factory. The Regional Provident Fnd Commissioner called upon the company to make contributions under the Employees Provident Funds Act. At that time the oil industry was not included in Schedule I of the Act but drums and containers were. The Court held that the demand made by the Regional Provident Fund Commissioner was not legal. Justice Mudholkar observed,

> " The word ' industry ' as already stated has been defined to mean a specified industry. What we have therefore to ascertain is, what was the industry in which the unit was engaged and not merely what was manufactured by the unit for the purpose of its industry. A unit may manufacture a number of things some of which may fall within the schedule. But if that was not the main or the dominant purpose of the industry, it would make no difference. In other words, where while carrying on an industry certain products are produced not with the object of marketing them separately but with the object of using them in the industry itself, then the production of those articles cannot result in the engagement in an industry or producing these articles. The word ' industry ' should be understood in the sense in which it is understood in the business community. If the industry, as here, is the production of edible oil, then all the intermediate products which are produced for carrying on that industry cannot be regarded as separate industries. Therefore, the mere fact that any of these products was included in the Schedule will not bring the Act into operation ".

With these observations I am in respectful agreements :

Tambe, J., however, stated:

> " I agree with may learned Brother in the conclusion reached *viz.*, that this petition should be allowed. However with utmost respect to my learned Brother, I do not find myself in agreement with the view taken by him that where the principal object of an industry does not fall within the meaning of the First Schedule of the Act then even if certain scheduled articles for being used in that industry only are manufactured, the provisions of the Act are not attracted. In my view, the determining factory is whether in any part of a factory any manufacturing process is going on and whether the manufactured article is such that it falls within the meaning of the First Schedule. But to attract the Act this alone is not sufficient. The number of persons employed in the unit engaged in the manufacture of such article must be fifty or more ".

It is on these observations of Tambe, J., that the learned counsel for the petitioners strongly relied.

The second case, I shall refer to, is *Nagpur Glass Works, Ltd.* v. *Regional Provident Fund Commissioner*[2]. The principal business of the petitioner there was the manufacture of glass in which 420 workmen were employed. It was also engaged in the manufacture of burners and metal lamps, consisting of glass oil containers and metal burners and reflectors. In this branch 187 people were employed. Schedule I of the Provident Funds Act did not at the relevant time include the glass industry. In 1953, the Provident Funds Act of 1952 was amended, and an *explanation* was added to

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1. A.I.R. 1957 Bom. 149. 2. A.I.R. 1957 Bom. 152.

Schedule I. This explanation gives a list of 'industries' which are included in the general heading 'electrical', mechanical or 'general engineering products' mentioned in the schedule. Neither burners nor metal lamps are included in this explanation; but 'hurricane lanterns' are. The Court held that metal lamps and burners would fall within the definition of electrical, mechanical or general engineering products but that nevertheless the Employees Provident Funds Act would not apply to the whole factory, since glass was not included in the Schedule at the relevant date and that the Act would apply only to that section of the factory, which produced burners and metal lamps. The learned Judges dissented from the view of Mehrotra, J., as reported in *Great Eastern Electroplaters, Ltd.* v. *Regional Provident Fund Commissioner*[1], about what would constitute electrical, mechanical and general engineering goods. The decision of Mehrotra, J., however is of interest in another respect. At page 194 the learned Judge observed :

"Before the provisions of the Act, therefore, could be applied to the present factory, it is necessary (*a*) that the factory should be engaged in any industry specified in the Schedule, (*b*) that it should employ 50 or more persons and (*c*) that it is not an infant-factory within the meaning of section 16 of the Act............"

The point to which I want to draw attention here is that the learned Judge was of opinion that the expression '50 or more persons' relates to 'factories' and not to 'industry'.

In *N. K. Industries (Pri.) Ltd.* v. *Commissioner, Regional Provident Fund*[2], Sahai, J., following the unreported decision of the Kerala High Court in *Kokkalai Rice & Oil Mills* v. *R.P.F. Commissioner,* expressed the view that the expression '50 or more persons' applied to 'factories' and not to 'industry.'

"The point therefore to consider is whether the expression 'in which 50 or more persons are employed' applied to 'factories' or to 'industry'. The petitioner's case is that it relates to 'industry', and not to 'factories'. To my mind the words 'In which fifty or more persons are employed' relate to 'factories' and not to industry. I say so because the latter part of the section, which is as follows, to my mind, makes it clear :—

"............but the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of the Act to all factories employing such number of persons less than fifty as may be specified in the notification and engaged in any such industry"........It is obvious therefore that it is the strength of the factory and not of that department in which that particular industry is being carried on which is to be considered. In other words the Act would apply to factories employing fifty or more persons though in that department of the factory in which that particular industry is being carried on less than fifty persons are working".

With respect I am unable to agree with the view that 'fifty or more persons' refers to industry and not to factory. It will be noticed that the word 'industry' is used in the Act to indicate a sector of economic activity in which several factories may be engaged, and not to a department inside a factory. Schedule I speaks of 'any industry engaged in the manufacture of any of the following : and then various items like cement, iron and steel, paper, textiles are enumerated. The cement industry, for example, would comprise a number of factories like those run by say, the Andhra Cement Co., the Associated Cements Co., and others. The word 'industry' as used in the Act is inappropriate to indicate only a unit or department inside a factory. This view is strengthened by the language of section 19 (*a*) of Act XIX of 1952, which gives power to the Central Government to remove difficulties whenever any doubt arises as to whether a 'factory' is engaged in any 'industry' or whether 50 or more persons are employed in a factory. This will make it clear that the word 'industry' and the word 'Factory' are not used in the sense in which they appear to have been understood in *N. K. Industries (Pri.) Ltd.* v. *Commissioner, Regional Provident Fund*[2] and the Kerala Case, *Kokkalai Rice and Oil Mills* v. *R. P. F. Commissioner* (supra). Whatever scope there may have been for argument about the meaning of these words in section 1 (3) as it originally stood, there is no such scope now after the section was recast and amended in 1956. As I mentioned before, sub-section (3) of section 1 was recast as follows by Act XCIV of 1956 :

1. 11 Factories Journal Reports 191. 2. A.I.R. 1958 All. 474.

"Subject to the provisions contained in section 16, it applies (*a*) to every establishment which is a factory engaged in any industry specified in Schedule I and in which 50 or more persons are employed."

The introduction of the conjunction 'and' between the words 'Schedule I' and the words 'in which 50 or more persons are employed' makes it manifest beyond doubt that the latter set of words must be related to 'factory'. This amendment made in the Act does not appear to have been noticed in the Allahabad case cited above as the judgment quotes section 1 (3) as it stood before its amendment in 1956.

At the same time I find it difficult to accept the view of the learned Government Pleader that if any part of a factory is engaged in making 'an engineering product' within the meaning of Schedule I of Act XIX of 1952, then that factory must be considered to be one engaged in making an engineering product, and that in consequence Act XIX of 1952, will apply to it. The error in this view consists in that it ignores the difference between what is primary and what is incidental. We can properly say that a carpenter is engaged in working on wood, in making chairs, tables, or windows as the case may be. But from time to time the carpenter sharpens his chisel on a piece of plank on which some sand is spread, or it may be that he replaces the broken handle of one of his chisels. That is only incidental to his primary or principal work as a carpenter. If the reasoning of the learned Government Pleader were right, we may as well say that when a clerk working in an office mends his pencil he is 'engaged' in mending pencils. But that will be manifestly absurd.

Let us take another illustration. Suppose there is a dairy farm where the milk is converted into butter, cheese, cream and other milk products. That will be a factory within the meaning of section 2 (*g*) of Act XIX of 1952. Now a dairy would require drums in which bran, cotton seed and other forms of cattle feed are stored. It will also require buckets of wood or other material in which the cattle feed is mixed and served to the animals. The dairy would also require churns, cream separators and other similar equipment. It would need vessels with handles for transporting the milk from the milking shed to the cold room. It may also keep bicycles for delivery of the articles to the customers. Now drums and containers figure as item 24 in the Explanation to Schedule I, and these would, therefore, be 'engineering products.' Parts and accessories of those products are also included as item 25. Now in order to operate efficiently, the dairy may employ one or two persons to repair its drums and containers, who may provide new hoops for the drums and buckets or rivets of the handles of vessels and other containers. They may also solder leaky vessels or repair or replace the tubing in the factory. Because one or two persons are engaged in such processes nobody would think of saying that the dairy is engaged in the manufacture of engineering products: On the basis of the reasoning of the learned Government Pleader one must be prepared to say that if a large hotel which employs 50 or more people also employs a man to repair its vessels and 'containers' by re-fixing the handles or for providing rivets to those handles whenever necessary it will be a factory engaged in the production of engineering goods. That would be a very extraordinary position.

It seems to me that the proper way of looking at the matter is this ; First of all we ask ; to what does the section apply? The answer at once emerges that it applies to 'factories' that is to say, to premises in any part of which a manufacturing process is carried on, whether with or without the aid of power. We next ask to what kinds of factories does it apply? We now find that two requirements have to be satisfied. One is that 50 or more persons must be employed in the factory. The other is that the factory must be engaged in one of the industries specified in Schedule I. One of those industries is the manufacture of engineering products as explained in the Schedule.

It is the 'factory which must be engaged. In other words that must be the primary activity of the factory. If with a view to carry out its primary activity, it is incidentally engaged in something else, it will not alter its primary character. The lerned Government Pleader argued that the section does not say that the factory must be wholly engaged in the specified industry. That is no doubt so. But this does not mean that the construction contended for by the learned Government Pleader is

correct. In order to get the result he is contending for, we will require the addition of a wholly new set of words in section 1 (3). We shall require words to the effect that if any part of a factory is engaged in making any article that false within the scope of Schedule I, then the whole factory would be deemed to be engaged in such industry. The learned Government Pleader argued that the Act is a benevolent enactment, and that, therefore, we must try to extend its scope as far as possible. It seems to me that it is for the Legislature to say how far it will go. A Court can only take the words as they are written in the statute. Suppose in the present case a jury were to be taken round the factory of the petitioners and after they have seen it and they come out of it they are asked ; what is this factory engaged in, the only answer they would give is that it is engaged in making pencils. That it seems to me, is the proper approach to the question. Of course, I agree that a factory may be engaged in producing more than one article. In such a case it would be perfectly correct to say that the factory is engaged in producing all those articles. I have no doubt whatever that the word 'engaged' in sub-section (3) of section 1 refers to the primary activity of the factory. I have quoted above from paragraph 7 of the judgment of the Bombay High Court in *Oudh Sugar Mills, Ltd.* v. *Regional Provident Fund Commissioner, Bombay*[1], and I repeat my respectful agreement with it.

In my view the factory run by the petitioners is not engaged in any industry specified in Schedule I of the Act XIX of 1952. The Act, therefore, does not apply to it. The rule *nisi* is, therefore, made absolute. There will be no order as to costs.

V.S. ——— *Rule* nisi *made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

N. Vellayan .. *Appellant**

v.

The District Forest Officer, Ramanathapuram Division at Sekkalai, Karaikudi and another .. *Respondents.*

Constitution of India (1950), *Article* 226—*Finality of the diversions of Executive Officers—Jurisdiction of the High Court to quash such orders—Error of law manifest—Conditions of sale of the right to minerals in the forest—Construction—Writ.*

The provisions regarding finality of the decisions of theExecutive Officers have always been understood to refer to the proceedings before the officer. Such a provision cannot take away the jurisdiction of the High Court under Article 226 of the Constitution to quash a decision of the District Forest Officer if it is based on a manifest error of law or the decision has the effect of the officer exercising a jurisdiction which is not vested in him.

The District Forest Officer is expected to have a rough estimate of the probable amount which would be reached at the auction of the right to quarry minerals in the forests. The officer gains his knowledge from an average computed on the amount fetched at previous sales. If the officer conducting the sale was of the opinion that the probable amount for which the sale would be concluded is likely to exceed Rs. 1,000 then he can insist on the bidder producing sales-tax clearance certificate even at the commencement of the auction. If any bidder is unable to comply wish the direction he will not be allowed to make the earnest money deposit and will not be allowed to partake in the auction. The construction placed by the officer on condition 3 (*f*) of the sale that even after deposit of the earnest money and at the stage when the bid exceeds the sum of Rs. 1,000 the officer can ask for the sales-tax clearance certificate from the bidders is a manifest error and the decision has to be quashed.

Having regard to the form of the certificate required it would not be necessary for a bidder who professes to be not a dealer at all and therefore not liable to tax under General Sales-tax Act to produce such a certificate.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Rajagopala Ayyangar, dated 1st October, 1959 and made in the exercise

1. A.I.R. 1957 Bom. 149.

* W.A. No. 109 of 1959.

27th October, 1959.
(5th Kartika, 1881-Saka).

of the Special Original Jurisdiction of the High Court in Writ Petition No. 553 of 1959, presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the 1st respondent herein not to take any further steps to confirm the sale either by execution of lease deed or otherwise in favour of the 2nd respondent, in respect of the sale held on 29th May, 1959, as per the Ramanathapuram District (Forest) Gazette Notification issued by the District Forest Officer, dated 27th February, 1959, regarding items 6 and 10 appended to the said notification and pass such further or other orders as this Hon'ble Court may deem fit in the circumstances of the case.

K. V. Venkatasubramania Ayyar, K. S. Ramamurti and *K. Sarvabhauman,* for Appellant.

The Additional Government Pleader (*M. M. Ismail*) and *D. Ramaswamy Ayyangar,* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopala Ayyangar, J., in Writ Petition No. 553 of 1959, filed by one Vellayan who is the appellant before us for the issue of a writ of *mandamus* directing the District Forest Officer, Ramanathapuram Division at Sekkalai, Karaikudi, not to take any further steps to confirm the sale in favour of the second respondent, S.R. Sundaraja Iyengar. The sale was of the right to quarry minerals in the Poolankurichi, Tirupathur Range in the Sivaganga Estate forests. The auction took place on the 29th May, 1959, at the District Forest Office next to Sekkalai Police Station, Karaikudi. The appellant and the second respondent were among the bidders at the auction. There was a notification published in the local District Gazette setting out the general and special conditions relating to the conduct of the auction sale. The decision of this appeal depends upon the construction of one of such conditions.

There is no dispute as to what happened at the auction. The appellant's last bid was Rs. 1,175. The second respondent raised the bid to Rs. 1,180. When the appellant wanted to bid higher, the District Forest Officer, prevented him from doing so on the ground that he was not able to produce the Sales Tax Clearance Certificate in the form appended to the sale notification. As the bid of the second respondent for Rs. 1,180 was the last highest bid it was accepted by the District Forest Officer. The appellant thereupon rushed up to this Court and filed the writ petition out of which this appeal arises for the issue of a *mandamus* or like writ to direct the District Forest Officer not to take any further steps to confirm the sale either by execution of lease deed or otherwise in favour of the second respondent.

The condition in question is contained in paragraph 3 (*f*) of the general conditions. It runs thus :

"The sales-tax clearance certificate in the form appended to the sale notice should be produced at the time of sale in cases where the sale amount exceeds Rs. 1,000 ".

The material portion of the Appendix is in the following terms :

"Any person desiring to bid at the auction sale, where the value of lease exceeds Rs. 1,000 should produce a sales-tax clearance certificate in the form appended below issued by the assessing authority having jurisdiction over the place of business (Assistant Commercial Tax Officer or Deputy Commercial Tax Officer as the case may be). Unless he produces such certificate at the time of auction to the officer conducting the sale, he will not be allowed to remit earnest money deposit and partake in the sale ".

The actual certificate by the Commercial Tax Officer concerned has to be to the following effect :

"In my opinion the applicant mentioned above has been/has not been doing everything possible to pay the tax demands promptly and regularly and to facilitate the completion of pending proceedings ".

There is a note which says :

"A separate certificate should be obtained in respect of each of the places of branches of the applicant from the Deputy Commercial Tax Officer or Assistant Commercial Tax Officer having jurisdiction over that place ".

The columns in the form which should be filled up by the applicant include the places of business of the applicant and the districts, taluks and divisions in which the applicant was assessed to sales-tax in the preceding four years.

The appellant alleged that he was not a dealer within the meaning of the General Sales Tax Act and, therefore, he could not procure any certificate that he had been doing everything possible to pay the tax demands promptly. It appears that other bidders were able to produce certificates though they were not dealers ; but the only certificate which the concerned Commercial Tax Officer gave was that the applicant's name is not to be found in the books of the department. This of course would not be strictly in the form contemplated by the notification. Be that as it may, the District Forest Officer thought that once the bid amount exceeded Rs. 1,000, none of the bidders could be allowed to bid further without the production of the sales-tax clearance certificate in the form appended to the notification even though the particular bidder professed that he was not a dealer.

Rajagopala Ayyangar, J., after discussing the scope of this rule, read along with the Appendix, and also referring to the other conditions set out the notification, came to the conclusion that the expression "at the time of the sale" in paragraph 3 (*f*) should be construed to mean at the time of the highest bid, that is to say, at the conclusion of the auction. From this interpretation it follows that the District Forest Officer was not right in calling upon the appellant to produce the sales-tax clearance certificate when the sale had not been concluded and the highest bid had not been reached. Nevertheless, the learned Judge refused to grant the appellant any relief for this reason, namely, that in any case even if the appellant's bid was the highest, it could not have been accepted because he would not have been able to produce the necessary sales-tax clearnace certificate at the conclusion of the sale. He therefore dismissed the application made by the appellant. Hence this appeal.

Before referring to the relevant rules which are likely to be of assistance in construing paragraph 3 (*f*), we may endorse in full the opinion expressed by Rajagopala Ayyangar, J., that the rules in many places are unintelligible and it is difficult often to be certain as to the meaning of the expressions. As the learned Judge says, most of the conditions are "so ill drawn as to be beyond comprehension ". In another place the learned Judge says " The phraseology adopted for most of these clauses is so obscure that it is really not easy to find out their exact meaning."

It is sufficient to refer to the following conditions for the disposal of the appeal :

" 2. (*b*) No person will be allowed to bid at the auction sale unless he has previously deposited a sum of Rs. 100 with the officer conducting the sale as earnest money deposit.

(*c*) Intending bidders should produce a solvency certificate issued only by Tahsildar or Deputy Tahsildar within whose jurisdiction such person owns immovable properties and provided that the date of such certificate is not earlier than 6 months prior to the date of sale and unless such certificate has been accepted by the officer conducting the sale as satisfactory.

(*d*) The successful bidder at the close of the sale should furnish a written statement, detailing the properties owned by him in his name, together with a certificate that they are not encumbered.

3. (*b*) No solvency certificate is necessary if the bidder deposits an earnest money deposit 50 per cent. of the average sale amount on the item in which he is interested subject to a maximum of Rs. 1,000. This amount would be forfeited to Government if he fails to pay the full amount and the security deposit immediately after the auction if he is the highest bidder........"

(*e*) In the case of sales involving not more than Rs. 500 the production of solvency certificate at the time of auction will be dispensed with subject to the condition that bidders remit necessary earnest money deposit at the time of sale and pay the entire amount immediately at the close of the sale.

We have already extracted 3 (*f*) above.

(*g*) The highest bidder should produce the income-tax clearance certificate within 15 days of receipt of confirmation order failing which the one-third or one-fourth of the sale amount in addition to his earnest money deposit will be forfeited and the contract is also liable for termination. This applies only if the sale amount exceeds Rs. 10,000."

It will be seen from a perusal of the several conditions that the term " sale ", " sale amount " and " auction " have been used indiscriminately. For instance the expression " time of sale " may well be understood as the time of the commencement of the auction or the time of the conclusion of the auction when the highest bid is accepted. When the officer is described as " conducting the sale " what is meant is conducting the auction and when a person is not to be allowed to partake in the sale, obviously, it means that the person will not be allowed to partake in the auction, that is, be allowed to bid.

We agree with Rajagopala Ayyangar, J., that if we understand the expression " time of sale " which occurs in paragraph 3 (*f*) to mean the conclusion of sale when the highest bid is reached, then it cannot be reconciled with what is to be found in the Appendix which contains a definite provision that unless any person desiring to bid at the auction produces a sales-tax clearance certificate for any item which would involve more than Rs. 1,000 he will not be allowed even to remit the earnest money deposit and partake in the sale. Now we have seen that the deposit of the earnest money is made even before the auction commences. Indeed no person can be allowed to bid at the auction unless he has previously made the deposit. In the Appendix there is a clear provision that an intending bidder will not be allowed to make the deposit of the earnest money unless he produces a sales-tax clearance certificate. Of course, if he is not allowed to make the deposit he will not be allowed to partake in the auction. There is no doubt an ambiguity as regards the expression ' where the sale amount exceeds Rs. 1,000.' But some light is thrown on the meaning of this expression by the Appendix and paragraph 3 (*b*). The Appendix speaks of the value of the lease exceeding Rs. 1,000. This obviously does not refer to the highest bid reached at the auction itself because the Appendix makes it incumbent on a person desiring to bid at an auction sale the value of which exceeds Rs. 1,000 to produce a sales-tax clearance certificate before he is allowed to make even a deposit of the earnest money. Condition 3 (*e*) refers to cases of sales ' involving not more than Rs. 500.' The basic idea appears to be this. The District Forest Officer is expected to have a rough estimate of the probable amount which would be reached at the auction. The officer gains his knowledge from an average computed on the amount fetched at previous sales. We have already referred to rule 3 (*b*) which mentions the average sale amount relating to a particular item. The District Forest Officer when he is of the opinion that the highest bid reached would exceed Rs. 500 should insist on the production of a solvency certificate but if, in his opinion, the highest bid was not likely to be more than Rs. 500, then he can dispense with the production of the solvency certificate. If follows likewise that if the officer conducting the sale was of the opinion that the probable amount for which the sale would be concluded is likely to exceed Rs. 1,000, then he can insist on the bidder producing a sales-tax clearance certificate even at the commencement of the auction. If any bidder is unable to comply with the direction he will not be allowed to make the earnest money deposit and will not be allowed to partake in the auction. On this point we are not inclined to agree with Rajagopala Ayyangar, J., that on a proper construction of rule 3 (*f*) it should be held that the sales-tax clearance certificate should only be produced at the time when the auction is concluded and the highest bid exceeds Rs. 1,000.

We are unable to find any provision in the notification under which the District Forest Officer conducting the sale has got the power and the authority to prevent one of the bidders from continuing to bid when the bid during the course of the auction exceeds Rs. 1,000. The officer is not called upon to insist upon the production of a certificate during the progress of the auction. The time at which the officer can insist upon production of the sales-tax clearance certificate is sometime before the auction commenced, that is, even before the deposit of the earnest money.

There is no dispute as to the facts, namely, that earnest money deposit was allowed to be made by the appellant and he was allowed to partake in the auction. Once the District Forest Officer allowed the appellant to bid, he had no power

during the course of the auction to prevent the appellant from continuing to bid at any particular stage. Mr. Ramaswami Ayyangar, learned counsel for the second respondent who is the contesting respondent, urged that the officer was evidently of the opinion that it was only when during the progress of the auction any bid exceeds Rs. 1,000 that he should call upon every bidder to produce a sales-tax clearance certificate and it was contended that the District Forest Officer's interpretation of the rules is final and binding as it were on this Court. In support of this last argument Mr. Ramaswami Ayyangar relied on Condition 17 which runs thus :

"In the case of any dispute arising about the conduct of the sale or interpretation of the rules, the decision of the District Forest Officer shall be final ".

Such provisions regarding finality of the decisions of executive officers have always been understood to refer to the proceedings before the officer. Such a provision cannot take away the jurisdiction of this Court under Article 226 of the Constitution to quash a decision of a District Forest Officer if it is based on a manifest error of law or the decision has the effect of the officer exercising a jurisdiction which is not vested in him. Mr. Ramaswami Ayyangar also referred us to Condition 16 which says that the District Forest Officer or the officer conducting the sale reserved to himself the right to allow or debar anyone from bidding at the sales. But certainly this does not contemplate the District Forest Officer to exercise the right to as to prevent a bidder from continuing to bid at an auction at which he was allowed to bid, at a later stage in the progress of the auction.

On this ground the appellant is entitled to relief. He has been prevented from partaking further in the auction by a manifest error in the interpretation of Condition 3 (*f*). The action of the District Forest Officer cannot also be supported because there is no power in the District Forest Officer to prevent a bidder from continuing to bid after a particular figure has been reached.

We are also of the opinion that having regard to the form of the certificate required, it would not be necessary for a bidder who professes to be not a dealer at all and, therefore, not liable to any tax under the General Sales Tax Act to produce such a certificate. It is true that a declaration by a bidder will not be the final word in the matter. If it afterwards turns out that the highest bidder is a dealer liable to pay sales-tax, then even if his bid is highest, his bid would not be accepted. This does not mean however that any bidder can in the middle of the auction be prevented from further partaking in the auction. It is not necessary to point out the several anomalies in insisting upon a person who is not a dealer producing a sales-tax clearance certificate in the form contained in the notification.

In the result we allow the appeal. The prayer in the appellant's petition stops with directing the District Forest Officer not to take further steps to confirm the sale in favour of the second respondent. A *mandamus* merely confined to that relief would be of no avail to anyone. It would only mean that the sale in favour of the second respondent would not be confirmed. It is therefore necessary to also give a direction to the District Forest Officer to proceed to conduct a fresh auction after due notice. Such a direction will be incorporated in the order of this Court.

In conclusion we only wish to say that we are in entire agreement with the following observations of Rajagopala Ayyangar, J. :

" I would urge upon Government the desirability of having the conditions of sale properly scrutinised and drafted so as to make them intelligible and consistent ".

There will be no order as to costs.

V.S. *Writ appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

S. Chattanatha Karayalar .. *Petitioner**

v.

The Income-tax Officer, Nagercoil and another .. *Respondents.*

Constitution of India, (1950), *Article* 226—*Exercise of discretion under—Existence of an alternative remedy.*

Income-tax Act (*XI of* 1922), *section* 5 (7-A) *as amended by Act* (*XXVI of* 1956) *and section* 34 *and Indian Finance Act,* 1950, *section* 13—*Scope—Applicability of Act XI of* 1922 *to Part B State—Transfer of assessment file from one officer to another—Scope of the power under—Power includes that of reopening assessment under section* 34 *of Act XI of* 1922—*Income -tax Act* (*XI of* 1922), *section* 63—*Notice to assessee by affixture under Order* 5, *rule* 17 *of Civil Procedure Code—Sufficiency.*

Prior to the re-organization of the States Travancore-Cochin was a Part B State under the Constitution and the Indian Income-tax Act was made applicable to that State by the Indian Finance Act, 1950, from 1st April, 1950. The Commissioner of Income-tax transferred the file relating to the assessee from Income-tax Officer, Nagercoil, to other officers under the amended section 5 (7-A) of the Indian Income-tax Act and the Income-tax Officer took up proceedings of re-assessment under section 34 of the Income-tax Act.

Held, The existence of an alternative remedy is a material circumstance that is taken into account when the Court is called upon in the exercise of its discretion to issue a writ of *certiorari* under Article 226 of the Constitution.

Where the petitioner has not availed himself of the remedies provided under the Income-tax Act, and where he did not take any objection to the jurisdiction of the officer in the assessment proceedings relating to the prior years, and where the period within which re-assessment proceedings could be initiated under section 34 of the Income-tax has long since expired and the issue of any writ at this stage quashing the order of assessment would place the Income-tax Department in a disadvantageous position as the proceedings for re-assessment could not be started *de novo,* a writ will not issue even if the petitioner is otherwise entitled to it.

The effect of the *Explanation* added to section 5 (7-A) of the Income-tax Act, by Amending Act, XXVI of 1956, is that once an order of transfer is made all the proceedings are transferred and the Income-tax Officer to whom the transfer is made would be in a position to continue not merely the pending proceedings but also to initiate further proceedings against the assessee in respect of any year past or future. That would include a power to re-open under section 34 of the Act assessment for any earlier year which had been completed at the time when the transfer was made.

Section 13 of the Indian Finance Act, 1950, provided that any law relating to Income-tax or Super-tax in force in the Part B State shall cease to have effect except for the purposes of levy, assessment and collection. A transfer of an assessment file from one Income-tax Officer to another is not one made for the purpose of assessment. Therefore the provisions of section 5 (7-A) as amended would apply to the instant case and the corresponding provision in the Travancore Act, section 7 (8) (same as that of section 5 (7-A) of the Indian Income-tax Act before the amendment) should be held to have been repealed by section 13 of the Indian Finance Act, 1950. Therefore Income-tax Officer to whom the file was transferred would have jurisdiction to commence proceedings under section 34 of the Indian Income-tax Act.

The provisions of the Indian Income-tax Act and not the Travancore Act would apply in regard to service of notice after the former Act came into force in the Travancore-Cochin State. Section 63 of the Indian Income-tax Act enables a notice to be served on the person either by post or as if it were a summons issued by the Court under the Code of Civil Procedure. Under Order 5, rule 17 of the Code there could be service by affixture, if the assessee could not be found after using all due and reasonable diligence and provided the Income-tax Officer was satisfied that affixture would be proper in the circumstances of the case.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of (*a*) *certiorari* and quashing the order of the 1st Respondent, dated August 9, 1956, in G.I. 67-C/1123 of re-assessment of Income-tax for the year 1123 (M.E.) the petitioner as karta of a joint family and the notice under section 41 (3) of the Travancore Income-Tax Act, 1/21 No. 67-C/1123. dated 9th August, 1956, from the Income-tax Officer, Nagercoil, to the petitioner and (*b*) prohibition restraining respondent 1 from taking any kind of steps and proceedings in pursuance of the said order and notice either himself or as may be directed by respondent 2.

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* W.P. No. 1506 of 1956. 23rd October, 1959. (1st Kartika, 1881—Saka.

P. S. Sarangapani Ayyangar, for Petitioner.

C. S. Rama Rao Sahib, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, J.—This is a petition under Article 226 of the Constitution for the issue of a writ of *certiorari*, calling for the records relating to the assessment of the petitioner to income-tax for the year of account 1946-47 (M.E. 1122) under the provisions of section 47 of the Travancore Income-tax Act, 1121, quashing the same and for allied reliefs. The petition was originally filed in the High Court of Travancore-Cochin. Rule *nisi* was issued by that Court. As the assessment was made by the Income-tax Officer, Nagercoil, which place by virtue of the State Re-organisation Act, became part of the Madras State, the petition was transferred to the file of this Court.

The petitioner is a resident of Shencottah. Admittedly, during the year of account, he was a karta of a joint Hindu family, which, amongst its other properties, had a business in the manufacture and sale of salt. The family was also entitled to a share in an unregistered firm, styled S.M.K.M. Allom. It is claimed that, about four years subsequent to the year of account, the family ceased to be undivided. But the statutory enquiry under section 25-A of the Income-tax Act has not yet been completed, and it is unnecessary, for the purpose of this petition, to pursue that matter.

In regard to the assessment for the year of account 1946-47, there was a dispute as to the Officer who was to assess the petitioner. The Commissioner of Income-tax, Mysore *cum* Travancore-Cochin, who had jurisdiction over the assessment relating to the petitioner, passed an order on 7th August, 1950, that the Income-tax Officer, Nagercoil, should be the Officer to assess the income of the assessee. Thereupon, the Income-tax Officer, Nagercoil, assessed the petitioner to Income-tax on 22nd September, 1950.

On 25th September, 1951, the Commissioner of Income-tax, Mysore *cum* Travancore-Cochin, purporting to act under section 5 (7-A) of the Indian Income-tax Act, transferred the assessment file relating to the petitioner from the file of the Income-tax Officer, Nagercoil, to the Income-tax Officer on special duty at Trivandrum. In the following year, the file relating to the petitioner was successively transferred from the Income-tax Officer on special duty at Trivandrum, to the Income-tax Officer, Trivandrum, and the Income-tax Officer, Special Circle, Trivandrum. The latter Officer was functioning in regard to the assessment of the petitioner, since 3rd July, 1953. During the course of assessment for subsequent years, that Officer appears to have received certain information which it was claimed led him to discover that the assessee had concealed his income of the year 1946-1947 (M.E. 1122). He, thereupon, initiated proceedings under section 47 of the Travancore Income-tax Act, 1121, which corresponded to section 34 of the Indian Income-tax Act. A notice was issued to the assessee on 27th April, 1955, calling upon him to submit a revised return for that year. To that notice, there was no response from the assessee. Subsequently, on 2nd July, 1956, a notice was issued under section 29 (4) of the Travancore Income-tax Act, asking the assessee to produce account-books relating to his income. On 16th July, 1956, the assessee wrote a letter to the Income-tax Officer, Special Circle, Trivandrum, objecting to his jurisdiction to issue the notice. By the very same letter, however, he requested an adjournment of the case to a day after the 10th of Spetember of that year. It was found that compliance with the request was impossible, as re-assessment of the escaped income had to be completed before 16th August, 1956, that is, within a period of eight years from 16th August, 1948, the end of the year of assessment. The Officer however granted a shorter time and posted the matter to 27th July, 1956, directing the petitioner to produce all the account-books of the family, together with all the relevant papers. In the meanwhile, that is, on 19th July, 1956, the Commissioner for Income-tax passed an order, as a result of which, the assessment file relating to the petitioner was finally transferred to the Income-tax Officer, Nagercoil. On receipt of the file, the first

respondent posted the case for hearing on 3rd August, 1956, by issuing a notice under section 29 (4). The notice was returned unserved by the process-server, stating that the assessee was not in his residential house at Trivandrum. The Officer, thereupon, effected service of the notice by affixture on the business premises of the firm, S.M.K.M. Allom, on 30th July, 1956 ; that notice intimated that the case was posted for enquiry to 8th August, 1956. The assessee did not appear. The first respondent, who had to complete the re-assessment by 16th August, 1956, assessed the petitioner to a tax under section 30 (4) of the Travancore- Income-tax Act, corresponding to section 23 (4) of the Indian Income-tax Act, by his order dated 9th August, 1956. The assessee, alleging that the remedies provided by the Income-tax Act would be expensive and circuitous, filed the present application under Article 226 of the Constitution, praying substantially that the first respondent should be prohibited from taking any steps in pursuance of the order of assessment.

The validity of the assessment was challenged before us on substantially three grounds. First the re-assessment proceedings were without jurisdiction, as the notice issued under section 47 of the Travancore Income-tax Act, 1121, corresponding to section 34 of the Indian Income-tax Act, was issued by an Officer, not validly authorised. According to the assessee, the Income-tax Officer, Special Circle, Trivandrum, who issued the notice under section 47 of the Travancore Income-tax Act, had no legal seisin of the case, as the successive orders of transfer by the Commissioner of Income-tax, Mysore cum Travancore-Cochin were bad, and not in accord with the provisions of section 7 (8) of the Travancore Act. Second, there was no proper or valid service of notice of the enquiry, particularly after the transfer of the file from the Income-tax Officer, Trivandrum, to the Income-tax Officer, Nagercoil, as a result of which, the assessee had no opportunity to put forward his case, and therefore, the assessment was opposed to principles of natural justice. Third, there was no jurisdiction in the Officer to initiate the proceedings on the basis of escaped assessment, as it had not been disclosed that any information was received by that Officer to discover the concealment, and that the re-assessment only revealed a mere change of opinion of the Officer.

Before considering the objections it has to be seen whether in the circumstances of the case, the petitioner, who has not availed himself of the remedies provided under the Income-tax Act, would be entitled to the issue of a writ of *certiorari* under Article 226 of the Constitution. The Income-tax Act provides an appeal against an order of assessment and further remedies in case the assessee is aggrieved by the order of the appellate authority. The existence of an alternative remedy has always been considered as a material circumstance to be taken into account, when a Court is called upon in the exercise of its discretion, to issue a writ of *certiorari* under Article 226 of the Constitution. If the petitioner was aggrieved with the order of the 1st Respondent, whether it was a case of improper assump ion of jurisdiction, want of sufficient opportunity to put forward his case or of erroneous or excessive assessment, he had at least three remedies under the Income-tax Act itself. (1) The petitioner could have raised objections and got the question of the jurisdiction of the Income-tax Officer, Special Circle, Trivandrum, settled immediately after the receipt of the notice of reassessment. (2) If the notice had not been properly served or if he had no reasonable opportunity to put forward his case he could have applied to the Income-tax Officer, under section 27, Indian Income-tax Act or the corresponding provision in the Travancore Act, if that was necessary. (3) He could have appealed against the order of assessment. He did none of these but was content with writing a half-hearted letter a year after the service of notice on 16th July, 1956, objecting to the jurisdiction of the Officer. That letter in a way would amount to a submission to the Officer's jurisdiction, notwithstanding an objection thereto, which the Income-tax authorities were competent to decide, as it requested time for producing the accounts and participating in the enquiry. Further the transfer of the file relating to the petitioner was made as early as 1953. That Officer presumably assessed the petitioner, at least, for subsequent years, till 1956. It does not appear that at any earlier stage there was any objection to the annual assessments.

The circumstances referred to above would appear to show that there was a submission to the jurisdiction of that Officer. These considerations would by themselves be sufficient for us to decline to exercise our discretion in favour of the Petitioner in the exercise of the jurisdiction under Article 226. But there is one further reason more decisive than the other, namely, that the issue of any writ at this stage, quashing the order of assessment, would place the Income-tax Department in a disadvantageous position, as the proceedings for re-assessment could not be started *de novo*. The period within which re-assessment proceedings could be initiated under section 34 (section 47 of the Travancore Income-tax Act) has long since expired. If the petitioner had invoked any of the three alternative remedies, to which reference was made, it would have been open to the Department to rectify the mistake, if any, and to proceed with the assessment of the escaped income. It would not be so, if we were to exercise our discretionary jurisdiction under Article 226. We should therefore, decline to issue the writ sought, even if the Petitioner is otherwise entitled to it.

In this view, it would be unnecessary to deal with the various contentions urged on behalf of the petitioner. But as the question has been argued before us, we shall proceed to deal briefly with them. It was first contended that the Commissioner of Income-tax had no jurisdiction to transfer the file relating to the assessee from the Income-tax Officer, Nagercoil, to the various Officers mentioned previously. The argument proceeded on the following lines. On the date when the transfer was made, the assessment in regard to the year 1947-1948, had been completed, and, there being no pending proceedings, the Commissioner would have no power to transfer under section 7 (8) of the Travancore Income-tax Act. Secondly, the order of transfer was general in its terms and unrestricted in regard to the period, and should for that reason as well be considered illegal. The re-assessment proceedings relating as they do to the assessment year 1947-48 (M.E. 1123) though started in 1955, would be governed entirely by the provisions of the Travancore Income-tax Act, and that, as section 7 (8) of the Act did not authorise a general order of transfer, the various orders, which contravened that requirement should be held to be invalid. The Income-tax Officer, Special Circle, Trivandrum, would therefore have no power to intiate proceedings.

The provisions of section 7 (8) of the Travancore Income-tax Act corresponded to section 5 (7-A) of the Indian Income-tax Act before the introduction of the *Explanation* to that section by the Amending Act XXVI of 1956. On that basis reliance was placed on the decision in *Bidi Supply Co* v. *The Union of India*[1]. That was a case which arose under section 5 (7-A) of the Indian Income-tax Act before it was amended. The Supreme Court held that an order of transfer expressed in general terms, without reference to a case for a particular assessment year actually pending before an Income-tax Officer, was not authorised by that section, and was, therefore, invalid.

After that decision was rendered the Union Legislature amended the Indian Income-tax Act by introducing an *Explanation* to section 5 (7-A). That states :—

> " In this sub-section (section 5 (7-A), ' case ' in relation to any person whose name is specified in the order of transfer means all proceedings under this Act in respect of any year which may be pending on the date of the transfer, and includes all proceedings under this Act which may be commenced after the date of the transfer in respect of any year ".

The effect of the *Explanation* is that, once an order of transfer is made, all the proceedings are transferred, and the Income-tax Officer to whom the transfer is made would be in a position to continue not merely the pending proceedings, but also to initiate further proceedings against the assessee in respect of any year, past or future. That would include a power to re-open under section 34 of the Indian Income-tax Act, assessment for any earlier year which had been completed at the time, when the transfer was made. Section 2 of Act XXVI of 1956 which introduced the amendment states that " the following *Explanation* shall be, and shall be deemed always to have been inserted.". . . It cannot be disputed that, if the

1. (1956) S.C.J. 492 : (1956) S.C.R. 267 : 29 I.T.R. 717 (S.C.).

Explanation to section 5 (7-A) were to apply to the instant case, the Income-tax Officer, Special Circle, Trivandrum, would have jurisdiction to initiate proceedings under section 47 of the Travancore Act. But what is contended is that section 5 (7-A) of the Indian Income-tax Act would not apply, as section 7 (8) of the Travancore Income-tax Act which corresponds to section 5 (7-A) before its amendment would alone apply, and the principle of the decision in the *Bidi case*[1], would apply. It has, therefore, to be considered as to how far the provisions of the Travancore Income-tax Act could be deemed to have been preserved.

As a result of the Constitution there was a political and a subsequent financial integration of the former Indian States with the rest of India. Travancore which was amalgamated with Cochin was a Part B State under the Constitution till the Re-organisation of States Act. The Indian Finance Act of 1950 contained certain provisions having permanent operation and provided for a uniform Income-tax Act for India.

Section 13 of the Indian Finance Act, 1950, so far as it is relevant, states :—

" If immediately before the 1st day of April, 1950, there is in force in any Part B State other than Jammu and Kashmir.................any law relating to income-tax or super-tax, or tax on profits of business, the law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purposes of assessment under the Indian Income-tax Act, 1922, or for the year ending on the 31st day of March, 1951, or for any subsequent year, or, as the case may be, the levy, assessment and collection of the tax on profits of business for any chargeable accounting period ending on or before the 31st day of March, 1949 :

Provided that any reference in any such law to an officer, authority, tribunal, or Court shall be construed as a reference to the corresponding Officer, authority, tribunal or Court appointed or constituted under the said Act, and if any question arises as to who such corresponding officer, authority tribunal or Court is, the decision of the Central Government thereon shall be final ".

If the provision in the Income-tax Act relating to a transfer of a case relating to an assessment from one officer to another could be said to be one for the purpose of assessment, section 13 of the Indian Finance Act would keep alive the operation of section 7 (8) of the Travancore Income-tax Act.

Prior to the re-organisation of the States, which came into effect on 1st November, 1956, Travancore-Cochin was a Part B State under the Constitution, and the Indian Income-tax Act was made applicable to that State as and from 1st April, 1950. The Indian Finance Act, 1950, provided for its application. Section 3 of that Act effected certain amendments to the Indian Income-tax, which were to come into force from 1st April, 1950. Section 1 (2) was amended so as to make the Indian Income-tax Act applicable to the whole of India, except the State of Jammu and Kashmir. Section 2 (14-A) which defined " Taxable territories " included Travancore-Cochin, as and from the date mentioned above. The result is that the Indian Income-tax Act alone would apply to Travancore-Cochin which was a Part B State, except to the limited extent saved by section 13 of the Indian Finance Act, 1950. That section states that the Income-tax law of the State shall cease to have effect, except for the purposes of levy, assessment and collection of income-tax. It cannot be disputed that the re-opening of a closed assessment on the ground that certain income had escaped assessment would come within the term of assessment under section 13. Therefore, the provisions of the Travancore Act would apply to re-assessment on the ground of escaped assessment. But the qu stion then would be, whether the transfer of the file from one Officer to another was one for the purpose of levy, assessment or collection of income-tax. If the answer is in the affirmative, the provisions of section 7 (8) of the Travancore Act, which corresponded to section 5 (7-A) of the Indian Income-tax Act in its original form, would apply. If, on the other hand, it is held that this statutory provision for transfer of assessment from one Officer to another is not part of the law of levy, assessment or collection, the provisions of section 5 (7-A) of the Indian Income-tax Act read with the *Explanation* would apply.

1. (1956) S.C.J. 492 : (1956) S.C.R. 267 : 29 I.T.R. 717 (S.C.).

Section 5 (7-A) occurs in Chapter II of the Act. That provides only for the machinery for the performance of various duties under the Act. That cannot be said to relate either to the assessment, levy or collection.

In *The Commissioner of Income-tax, Bombay* v. *Messrs. Khemchand Ramdas*[1], the Privy Council observed that the word 'assessment' was used in the Income-tax Act as meaning sometimes, the computation of income, and somtimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. None of these elements would include the question as to which officer is to make the assessment in regard to a particular assessee. An assessment starts with the issue of a notice, calling for a return or with the submission of return where it is voluntarily done. Section 5 of the Indian Income-tax Act, as well as the corresponsing provision in the Travancore Act, is one which authorises the establishment of a machinery for the purposes of the Act unrelated to the assessment in a given case, though as a machinery it would be essential for that purpose. The question as to who should assess in a particular case might in one sense relate to the assessment of that individual but it cannot be said to be one for the purpose of assessment. Section 5 (7-A) is concerned with the powers of the superior authorities to transfer the cases on grounds of expediency and is not based on any vested right in the assessee, though the exercise of the power should be so made as not to cause undue hardship or on extraneous considerations. The scope of the section 5 (7-A) as amended was considered in *Binjraj* v. *Union of India*[2]. It was held that the provision which authorised a transfer did not violate any fundamental right of an assessee, and it was only if the power was exercised in discriminatory manner or for an extraneous consideration, the assessee could challenge it in Court, provided he had not acquiesced in the jurisdiction of the Income-tax Officer to whom the case had been transferred but, that, if an assessee had acquiesced in the jurisdiction of the Income-tax Officer, he could not subsequently object to the jurisdiction of the Officer. It cannot, therefore be said that a transfer of an assessment file from one Income-tax Officer to another is one made for the purpose of assessment as an assessment could be made without such transfer. In our opinion, the provisions of section 5 (7-A) read with the *Explanation* would apply to the instant case, and the corresponding provision in the Travancore Act, section 7 (8), should be held to have been repealed by section 13 of the Indian Finance Act, 1950. It follows that the Income-tax Officer, Special Circle, Trivandrum, had jurisdiction to issue the notice under section 47 of the Travancore Income-tax Act. In this view, it is unnecessary to consider whether the petitioner also acquiesced in the jurisdiction of that Officer.

It was next contended that the assessment was opposed to the principles of natural justice, as the assessee had no notice of the proceedings. Admittedly the notice under section 34 (section 47 of the Travancore Act) was served. The service of the subsequent notices are relevant only for considering the question whether the assessee had sufficient opportunity to place his case: It is difficult to believe that the assessee was wholly unaware of the proceedings. The Income-tax Officer, by his letter dated 18th July, 1956, had intimated the assessee that the assessment had to be completed before 16th August, 1956. There is no reason to believe that the assessee himself was unaware of the law. When, therefore, the case was posted to 27th July, 1956, a person in the position of the assessee would normally have gone to that Officer, and ascertained as to what happened to the case. Strangely enough the assessee kept silent. It looks as if that both the Income-tax Officer and the assessee were racing for time, the former to complete the assessment within 16th August, 1956 and the latter to thwart it. It is argued that the service of notice by affixture was not authorised by the provisions of the Travaconere Income-tax Act. Section 110 (1) of that Act provided:

> "A notice or requisition under this Act may be served on the person, therein named, either by post or anchal (personal service) as if it were a summons issued by a Court under the Code of Civil Procedure, 1908".

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1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : I.L.R. (1938) Bom. 487 (P.C.).
2. (1957) 31 I.T.R. 565 (S.C.).

It is contended that, in the absence of service of notice by post, the service could be by anchal post, and that service by affixture was not authorised by that Act. There is, no doubt, the unfortunate unambiguity in the section. It is unnecessary to consider whether that provision authorises service by affixture, as, in our view, the provisions of the Indian and not the Travancore Income-tax Act would apply in regard to service of notice after the former Act came into force in the Travancore-Cochin State Section 63 of the Indian Income-tax Act enables a notice to be served on the person therein named either by post or, as if it were a summons issued by a Court under the Code of Civil Procedure, 1908 (V of 1908). Under Order 5, rule 17, Civil Procedure Code there could be service by affixture, if the defendant could not be found after using all due and reasonable diligence, and provided the Court was satisfied that affixture would be proper in the circumstances of the case. In the present case, the Officer had declared that service by affixture was sufficient. There is no material placed before us to show how that declaration was wrong, and what is more important how it resulted in the denial of an opportunity to the petitioner to put forward his case. In our opinion, the petitioner had more than one opportunity to put forward his case. Admittedly, a notice of re-assessment proceedings was given to him. He was asked to submit his return. There was a further notice under section 29 (4). He himself took time from the Officer for submitting his accounts, and was also informed that the assessment had to be completed by 16th August, 1956. There is therefore no substance in the contention.

On the third contention relating to the propriety of the assessment there are very little merits. The Officer stated in his order, that, during the course of the assessments for the subsequent years, definite information came into the possession of the Department that the assessee was systematically manipulating his accounts, the device of evasion adopted being reduction of profits by undue inflation of expenses in the manufacture of salt, and that that information led to the discovery that the assessee had concealed the income in the material year. The original order of the assessment was not made on the basis of any comparable case. The expenses given by the assessee, were acepted, though the quantity of salt manufactured was compared with the registers of the Salt Department. Those registers did not and could not have supplied the actual expenses incurred by the assessee. In the original assessment the income was found after accepting the expenses, as given by the assessee. When, therefore, it was subsequently revealed that the assessee had inflated the expenses of manufacture, so as to reduce the profit, the first respondent was fully justified in reassessing the expenditure by taking into consideration the comparable case. In the circumstances, it cannot be said that there has been any error in the exercise of the jurisdiction of the Income-tax Officer to assess the petitioner.

The petitioner is not, therefore, entitled to the issue of the writ, asked for.

The rule *nisi* is discharged, and the petition is dismissed with costs. Counsel's fee Rs. 250.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

M. Vedachala Mudaliar (died) and others .. *Appellants**

v.

S. Rangaraju Naidu .. *Respondent.*

Contribution—Suit for—Penalty under section 28 (1) *of the Income-tax Act (XI of* 1922)*—Proceedings commenced after dissolution of firm—Recovery of penalty from one partner—Liability of the other partner—Orders of income-tax assessment relating to the levy of penalty—Admissibility in evidence to prove wilful wrong-doing—Contract Act (IX of* 1872), *section* 69*—Not applicable in suits for contribution.*

Where as a result of wilful wrong-doing on the part of two persons they became jointly and severally liable to pay a penalty to the State and such penalty is wholly recovered from one person he cannot maintain a suit against the other for contribution.

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* Appeal No. 158 of 1956.

24th September, 1959.
(2nd Asvina, 1881—Saka).

Section 69 of the Contract Act cannot be invoked in a case where contribution is claimed.

The basic principle underlying section 28 (1) of the Income-tax Act is that a penalty could be levied under the section only on a person in existence on the date the penalty is imposed by the competent authority and that the Act could not authorise the levy of penalty on the assessee which had ceased to be in existence on the relevent date, as in the instant case where the proceedings under section 28 were commenced after the firm had been dissolved.

The order levying a penalty might be an order passed without jurisdiction. But so long as that order remained in force without being set aside in appropriate proceedings, it would be lawful for the Income-tax authorities to enforce the order and get the amount collected. In a case where action is taken under section 28 (1) against a firm consisting of two partners the notice required under section 28 (3) may be served on a partner. The fact that order levying penalty was passed by the Income-tax authorities without jurisdiction and no notice was served on the other partner does not by itself disentitle the partner suing to the relief of contribution.

The statements in the orders of assessment that the assessee had concealed his income, furnished inaccurate particulars and the partners authorised the illegal sales resulting in the levy of penalty form legally admissible evidence in the suit for contribution by one partner against the other.

Yegnanarayana v. *Yagannadha Rao*, 34 L.W. 618, followed.

Even under the agreement between the partners at the time of the dissolution of the firm the liability to pay the penalty was that of the plaintiff.

Appeal against the decree of the Court of the Subordinate Judge of Pudukottai in O.S. No. 7 of 1954.

V. Sethuraman, S. Padmanabhan and *K. R. Ramamani*, for Appellant.

T. R. Srinivasan, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff appeals from the judgment and decree dated 30th November, 1955, on the file of the Subordinate Judge of Pudukottai, in Original Suit No. 7 of 1954 on his file.

The plaintiff and the defendant's father, Srinivasalu Naidu, were doing business as partners until Srinivasalu Naidu's death, on 19th September, 1942. After his death, the defendant was admitted to the partnership in his father's stead. The main business of the firm consisted in the sale of petrol and allied products as agents of Messrs. Burmah Shell Company. The firm had its headquarters at Pudukottai and branch at Karaikudi and other places. Though, on Srinivasalu Naidu's death, that partnership was, in law, dissolved, accounts were not settled and the assets and liabilities were taken over by the new firm of which the plaintiff and defendant were the partners. This partnership was registered under the Indian Partnership Act. It continued to do business until it was dissolved by agreement of parties on 17th January, 1945. At the time of the dissolution, proceedings for assessment of the profits of the firm to tax were pending. The assessment proceedings for the years 1943-44 and 1944-45 were concluded after the dissolution. The profits, found by the Income-tax authorities to have been earned by the firm, were carried into the separate accounts of each of the partners, one-half to the assessable income of the plaintiff and the other half to the assessable income of the defendant.

In assessing the profits of the firm of Vedachala Mudaliar and Rangaraju Naidu, the Income-tax authorities did not accept as correct the accounts submitted by the firm. The authorities held that, in addition to the sum disclosed in the accounts, the firm had received moneys by sale of diesel oil at prices in excess of the authorised price. During the accounting years 1942-43, 1943-44, control orders were in force relating to the sale of petrol and diesel oil, and sale of diesel oil at prices in excess of the prices fixed by the control orders was an offence under the law. The income-tax authorities held, after enquiry, that there had been such sales on the part of this firm and although the amount determined by the income-tax officer as realised by the firm by such sales was reduced in appeal, the finding of the income-tax officer that there had been such sales was maintained and profits were determined accordingly.

After the proceedings relating to assessment of the partners to tax were completed, the income-tax officer proceeded to take action under section 28 of the Act. Under that section, if the income-tax officer is satisfied that any person has concealed the

particulars of his income or deliberately furnished inaccurate particulars of such income the officer may direct that such person shall pay, by way of penalty, such sum, in addition to any tax payable by him, as the income-tax officer may decide to levy. Acting under that section, the income-tax officer passed orders in 1951 directing the firm to pay a penalty of Rs. 19,000 in respect of the year 1943-44 and Rs. 13,000 in respect of the year 1944-45. The proceedings under section 28 were commenced after the firm had been dissolved by agreement of parties. The income-tax officer was aware of the fact of the dissolution. In relation to the proceedings taken under section 28 of the Act, notice was served only on the plaintiff as partner of the firm to show cause why such penalty should not be levied. He appeared on behalf of the firm and showed cause. After the orders levying the penalty were passed, the plaintiff was called upon to pay the entire amount and, on threat of coercive steps, he paid Rs. 16,000. The income-tax officer sent the notice, Exhibit B-2 on 3rd July, 1951 to the defendant informing him that the firm had been ordered to pay Rs. 32,000 as penalty under section 28 (1) (*c*) of the Income-tax Act and that the plaintiff had paid his half share namely Rs. 16,000 and called on the defendant to pay the balance of Rs. 16,000. The defendant did not pay. He took no notice of that demand. The plaintiff purporting to act on behalf of the firm appealed to the Appellate Assistant Commissioner who reduced the penalty for both years together to Rs. 9,800. That sum was withheld out of the sum of Rs. 16,000 which had been paid by the plaintiff and the balance was refunded to him.

The plaintiff called upon the defendant to pay the plaintiff a half of the sum of Rs. 9,800 which he had paid to the income-tax authorities as penalty levied under section 28 (1) (*c*) of the Act, and pay the plaintiff, further, a half of the expenses which he had incurred in conducting the proceedings before the income-tax officer and the Appellate Assistant Commissioner. The defendant repudiated liability. Consequently, the plaintiff instituted the suit which has given rise to this appeal for recovery of a sum of Rs. 7,080-12-2.

The plaintiff stated in paragraph 7 of the plaint that the defendant had had the benefit of the entire profits realised by the firm during the accounting years 1942-43, 1943-44 and that, since he had his share of the profits, he was bound to pay a half share of the liability. The plaintiff pleaded further that the ascertainment of the profits and the payment to the defendant of his half share at the time of the dissolution of the partnership in January, 1945 were subject to the defendant bearing a half share of the liabilities of the firm and that, even independently of that contract, the defendant was bound under law to pay a half of the penalty which the plaintiff had paid and a half of the expenses which the plaintiff had icnurred.

The defendant in his written statement pleaded that, during the period of his partnership with the plaintiff, the affairs of the firm had been managed solely by the plaintiff, and that the defendant was a sleeping partner. The defendant denied that he had received or had been paid any part of the profits said to have been illegally earned. The defendant pleaded that, since the plaintiff appeared to have had the exclusive benefit of the illegal profits, he was bound solely to bear the burden of the penalty. The defendant alleged that at the time of the dissolution of the partnership, accounts were settled in full between him and the plaintiff and there was no reservation of any contingent liability. Under the terms of the dissolution, according to the defendant, the plaintiff alone was bound to bear the penalty. The defendant denied that any expenses had been incurred as alleged in the plaint or that he was liable to bear a half of the expenses. The defendant contended that, the transaction in respect of which the expenses were incurred being illegal, the defendant could not, in law, be called upon to pay the plaintiff any part of the expenses.

The learned Subordinate Judge held that the levy of the penalty was illegal; and that the Income-tax Officer did not have jurisdicion, after the dissolution of the firm, to take action against the firm under section 28 of the Act. It was conceded before him that, if the levy of the penalty was illegal and without jurisdiction, the plaintiff could not claim contribution from the defendant. That was the main ground on which the learned Subordinate Judge dismissed the plaintiff's suit.

The learned Subordinate Judge held further, that, even assuming that the income-tax officer had jurisdiction under section 28 (1) of the Act, after the dissolution of the partnership, to levy a penalty on the firm, the proceedings which ended in the order levying the penalty could not bind the defendant, because no notice had been taken out to him calling on him to show cause why penalty should not be levied. There was a subsidiary point mentionerd by the learned Subordinate Judge in his judgment relating to the time when this alleged illegal transaction took place. The defendant's father died in September, 1942. The learned Subordinate Judge said that, during the accounting year 1942-43 the illegal transactions had taken place during the father's period of partnership and that, therefore, the defendant could not be made liable for the penalty levied as for that year. The Subordinate Judge found also that, under the terms of the dissolution of the partnership in 1945, there was no reservation of liability under which the defendant could be called upon to share with the plaintiff the liability to pay the penalty. On the question whether the defendant was only a sleeping partner, the Subordinate Judge held that he was not. On the question whether both the partners would be liable to pay the penalty if the levy of the penalty was justified, the Subordinate Judge held that both the partners would be liable.

The first question for decision in this appeal is whether the income-tax officer acted without jurisdiction in taking action under section 28 (1) of the Income-tax Act after the date of the dissolution of the firm. On that point, the appellant's learned counsel states that there is no plea in the written statement that levy of penalty on the firm was illegal on the ground of want of jurisdiction. It is true that no such express plea appears in the defendants' wirtten statement. But the plea raises a pure question of law on the facts admitted in the plaint. The plea was taken during the trial of the suit and the learned Subordinate Judge has considered the plea and given a finding thereon. The question has therefore to be considered and decided in the appeal. On that question, the learned Subordinate Judge held that the income-tax officer did not have jurisdiction to take action under section 28 (1), after the date of dissolution of the firm. His view on that point is fully endorsed by the decision of this Court in *Veerappan* v. *Commissioner of Income-tax*[1]. On facts not distinguishable from the facts of this case, it was held in *Veerappan* v. *Commissioner of Income-tax*[1] that the basic principle underlying section 28 (1) is that a penalty could be levied under the section only on a person in existence on the date the penalty is imposed by the competent authority and that the Act could not authorise the Income-tax Officer to levy a penalty under section 28 (1) on the assessee which had ceased to be in existence on the relevant date. The Subordinate Judge's view that the order passed by the Income-tax Officer, confirmed in apeal by the Appellate Assistant Commissioner, and the Income-tax Appellate Tribunal is an order which is legally not sustainable is correct. That finding, however, would not conclude the case against the plaintiff. It appears to have been conceded in the lower Court by the learned advocate who appeared for the plaintiff that, if the penalty levied by the income-tax officer was without jurisdiction, the plaintiff could not claim contribution from the defendant. That was an erroneous concession on a point of law. The order levying penalty might be an order passed without jurisdiction. But so long as the order remained in force, it would be lawful for the Income-tax authorities to call upon the revenue authorities concerned to enforce the order and collect the penalty. The collection of the penalty would not be unlawful though the order had been passed without jurisdiction. The only consequence of the order being an order passed without jurisdiction is that, if appropriate steps were taken in the appropriate forum, the order may be set aside. That is what happened in *Veerappan's case*[1]. On the basis of the order, the authorities sought to collect the tax. The assessee filed a petition for the issue of a writ of *certiorari* for quashing the order and that petition was allowed. If the assessee had not filed that writ petition and obtained an order quashing the order of the Income-tax Officer, the assessee would not have been permitted to resist enforcement of the order levying the penalty. In this case, the plaintiff appealed to the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. The penalty was reduced by the

1. (1957) 2 M.L.J. 286 : I.L.R. (1957) Mad. 1204.

Appellate Commissioner. No further relief was obtained from the Tribunal. The plaintiff did not take any further steps to have the order quashed. The defendant received the communication Exhibit B-2 from the Income-tax Officer personally informing him that the order levying the penalty had been passed and that he was liable to pay the amount which remained unpaid. He did not take any action to have the order set aside. Therefore, the order could have been enforced either against him or against the plaintiff. The liability of the firm was the joint and several liability of the partners. I find that the fact that the order levying the penalty had been passed by the income-tax authorities without jurisdiction does not by itself disentitle the plaintiff to the relief of contribution.

The next contention urged on behalf of the defendant, which the learned Subordinate Judge accepted, was that the order was, in any event, not binding on the defendant. The reason urged in support of the contention was that notice of the proceedings under section 28 had not been given to the defendant until after the order had been passed by the Income-tax Officer. But in a case where action is taken under section 28 (1) against a firm, notice required under section 28 (3) may be served on a partner of the firm. Section 63 (2) of the Act is to the same effect. Since notice of the proceedings under section 28 (1) was served on the plaintiff, the defendant cannot plead that he had not been personally served with notice before the Income-tax Officer passed the order levying the penalty.

I find that neither the fact that the order of penalty might have been set aside if appropriate steps had been taken in the High Court nor the fact that the order wa made without giving personal notice to the defendant disentitles the plaintiff to thes relief of contribution.

The next question is whether, notwithstanding that the order levying the penalty might have been enforced either against the plaintiff or against the defendant, the plaintiff is not entitled to the relief of contribution, by reason (1) either of the contract between the parties at the time of the dissolution or (2) under the rule of law relating to contribution as between wrong-doers.

On the question whether, under the contract between the parties at the time of the dissolution of the partnership in 1945, the defendant was bound to contribute towards the penalty paid by the plaintiff, the learned Subordinate Judge finds that there was no agreement between the parties at the time of the dissolution whereby the defendant undertook to share any such liability. There is the evidence of the plaintiff who says :

> " After the defendant ceased to be a partner that is after 16th January, 1945, I associated Manager Govindarajulu Naidu as a partner........The new partnership took over the assets and liabilities of the old partnership and continued as before ".

The defendant stated :

> " On 16th January, 1945 there was a dissolution of partnership between us, and I was paid half a share of the profits accrued and the whole of the capital contributed by me. The plaintiff took the entire stock in trade of the business..................
>
> At the time of the the dissolution it was agreed that I should not be held liable for any tax that might be levied on the suit partnership. The plaintiff must have spent the moneys in his own interest."

In the order of the Income-tax officer, dated 16th March, 1950 relating to the year of assessment 1945-46, the Income-tax Officer states in relation to the firm of Vedachala Mudaliar and Rangaraju Naidu :

> " The assessee firm was dissolved on 16th January, 1945, the assets and liabilities of the firm having been taken over by Mr. M. Vedachala Mudaliar. The other partner Mr. S. Rangaraju Naidu has retired from the business ".

It would of course not be correct to describe the transaction as a transaction of retirement of the defendant from the partnership. The expression "retirement" would be appropriate if there were more than two partners at that time and the partners other than the retiring partner continued the business as a firm. In this case, the plaintiff and the defendant were the only partners and the appropriate terms in relation to the severance of the defendant from the business is dissolution and not retirement. There

1. A.I.R. 1929 P.C. 184.

was no firm in existence immediately after the defendant severed his connection with the business. It was being continued by Vedachala Mudaliar as the sole proprietor. A few weeks thereafter he entered into a partnership with Govindarajulu Naidu in relation to the same business and the business which was the exclusive concern of Vedachala Mudaliar became the business of the partnership after the formation of the firm of which Vedachala Mudaliar and Govindarajulu Naidu were partners.

In support of the proposition that the defendant was bound to pay a half share of the penalty, the appellant's learned counsel relied on the decision in *Haveli Shah* v. *Charan Das*[1]. In that case after the dissolution of the partnership, two items which represented properties of the partnership were received by the principal partner who was continuing the business. The junior partners who had ceased to be partners by reason of the dissolution claimed their share of the assets. It was held by the Courts in India that the junior partners were entitled to a share. The Judicial Committee confirmed that decision. It was found that those two items which were subsequently received, were destined for the assets of the firm and were not included in the accounts which were settled at the time of the dissolution. After the dissolution, the principal partner had given receipts for the moneys due to the junior partners. The question whether the junior partners were entitled to a share of the assets received after the dissolution turned on the construction of those receipts. If, as a matter of construction of the receipts, it could be said that the accounts were finally settled and that the junior partners would not be entitled to any share in the assets received subsequent to the dissolution, notwithstanding that such assets were not included in the accounts, the suit would fail. If, on the other hand, on a construction of the receipts, it was found that the intenion of the parties was that the accounts should be settled in relation only to the matters stated in the accounts and that, as regards subsequent receipts, the parties would be entitled to shares in the same way as they would have been entitled before the settlement of accounts, the junior partners would be entitled to succeed. On the terms of the receipts and looking at the context in which the receipts were passed, the Courts held that the settlement at the time of the dissolution did not extend to the assets received subsequent to the dissolution; and that, therefore, in the items subsequently received the junior partners were entitled to a share, in the same way as they would have been if the assets had been received before the dissolution. That decision, therefore, does not lay down a rule of law applicable to every case of an asset falling in, or a liability arising, after the dissolution of a partnership. With reference to the terms of the dissolution of the partnership between the plaintiff and the defendant, we would have to determine whether, in regard to any liability which accrued thereafter as a liability of the partnership, the defendant would have to share the burden with the plaintiff. The plaintiff's own evidence makes it clear that, after the date of the dissolution, the defendant had nothing to do either with the assets or the liabilities of the partnership. If any item of asset were discovered subsequent to the settlement of accounts, as an asset of the partnehip, the defendant would not be entitled to claim a share in such asset. He handed over the business to the plaintiff as his exclusive concern and received profits as ascertained from the accounts and the capital contributed by him and ceased his connection with the business. The inference to be drawn from the evidence is that the business inclusive of the assets and liabilities as they stood on the date of the dissolution and of assets and liabilities which might be discovered or might accrue after the date of dissolution became the exclusive concern of the plaintiff, and that the defendant would not be entitled to any asset which might be discovered subsequent to the dissolution and would not be liable to share any burden which might accrue susequent to that date. I find on this point that, under the agreement between the parties at the time of the dissolution, the plaintiff was bound himself to bear the penalty that was levied. The next question, is whether assuming that there was no agreement betwen the parties, either express or implied, relating to the penalty, the plaintiff would, in law, be entitled to claim contribution. Discussion of that question often takes the form of a discussion of the applica-

1. A.I.R. 1929 P.C. 184.

bility in India of the rule stated in *Merryweather* v. *Nixan*[1]. It is unnecessary to consider the facts of that particular case, or the precise form of the rule laid down therein. An exhaustive discussion of the subject is found in *Yegnarayana* v. *Yagannadha Rao*[2] The rule in the form in which it should be applied in our country is thus stated by Madhavan Nair, J., in that case :

> " If an act is unlawful, or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom ".

If two persons deliberately commit an offence and derive profits therefrom and the commission of the offence involves them in a penalty for which they are jointly and severally liable, one person from whom the penalty is wholly realised cannot maintain an action for contribution against the other. That decision is in full accord with the earlier Bench decision of this Court in *Manja* v. *Kadugochen*[3]. That decision itself followed the Bench decision in *Suput Singh* v. *Imrit Tewari*[4]. It is true that the rule, as stated by Madhavan Nair, J., in *Yegnarayana* v. *Yagannadha Rao*[2], was not fully endorsed by King, J., in *Venkatarao* v. *Venkayya*[5]. The view of King, J., was adopted in *Dharna Dhar* v. *Chandra Shekhar*[6]. In England, the rule as to joint tort-feasors not being entitled to contribution has been abrogated by the Law Reform (Married Women and Tort-feasors) Act, 1935. Section 6 of the Act states that where damage is suffered by any person as a result of a tort (whether a crime or not) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against the other tort-feasor and every tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor. There is, however, no right of contribution from any person who is entitled to be indemnified by the person seeking contribution. The English Act would not, in terms, apply to a case like the present where the liability was not founded on a tort but arose out of acts for which the State levied a penalty. But, irrespective of whether the English Act would be applicable to the facts before us, I am bound to follow the rule laid down in *Manja* v. *Kadugochen*[3] and *Yegnarayana* v. *Yagannadha Rao*[2]. The rule of law to be applied to this case may be thus stated : Where as a result of wilful wrong-doing on the part of two persons, they became jointly and severally liable to pay a penalty to the State, and such penalty is recovered wholly from one person, he cannot maintain a suit against the other for contribution.

That leads us to the question of fact whether there was wilful wrong-doing on the part both of the plaintiff and the defendant. If the sales of diesel oil at prices in excess of the price prescribed by law had been made by the employees of the firm without the knowledge of the partners, the firm could not justly have been made liable to pay a penalty. It is true that, in this case, there is no evidence that either partner directed the sale of diesel oil at prices in excess of the legally permissible price or appropriated profits accruing therefrom. But we cannot obviously have evidence of that kind in this suit, because the persons examined are the plaintiff and the defendant and the employees of the firm. On that point, we have only the statements found in the orders of the Income-tax Authorities, when they declined to accept as correct the accounts submitted by the firm for the assessment years 1943-44 and 1944-45. The question for decision is whether the statements made in the orders for assessment form legally admissible evidence. That question, I answer in the affirmative on the basis of the decision in *Koppanna Chelamiah* v. *Suryanarayana Jagapathi*[7]. I adopt, with respect, the statement of the law made in that case that the judgment in a suit which is the basis of a suit for contribution is admissible in evidence in the suit for contribution. In that case, the Subordinate Judge based his decision on the finding in the previous judgment which showed that the plaintiff was a joint tort-feasor. This

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1. (1799) S.T.R. 186.
2. (1931) 34 L.W. 618.
3. I.L.R. 9 Mad. 89.
4. (1880) I.L.R. 5 Cal. 720.
5. (1942) 2 M.L.J. 427 : A.I.R. 1943 Mad. 38 (2).
6. I.L.R. (1952) 1 All. 759.
7. (1920) 37 M.L.J. 346 : 10 L.W. 261.

Court held that the Subordinate Judge was right. In this case, the Officer, who passed orders of assessment in relation to the assessment years 1943-44 and 1944-45, and in relation to the levy of penalty, held that the firm was itself a party to the illegal sales. The Income-tax Officer stated in his order, dated 28th February, 1951 that the assessee had concealed his income and furnished inaccurate particulars of it. The Appellate Assistant Commissioner stated in his order, dated 15th October, 1952 that the transactions in the black market and income therefrom were concealed by the appellant and so the penalties were rightly levied. The Income-tax Appellate Tribunal, dealt more specifically with the question whether the sales had been made without the knowledge of the partners. The Tribunal stated :

> " It is idle for the assessee to attempt to make a scape-goat of its employees at Karaikudi ".

The probability is that the employees would not sell in black market without the approval of the partners. The finding recorded by the Income-tax Authorities that the assessee, namely, the partners, authorised the illegal sales is correct, and I accept it. There is evidence that both partners were in management of the affairs of the firm. The learned Subordinate Judge has accepted that evidence. I see no reason to differ from him. I find that the penalty was the result of deliberate wrong-doing on the part of both the partners. That being so, I find that the rule of law enunciated in *Yegnarayana* v. *Yagannadha Rao*[1], becomes directly applicable, and one partner cannot sue the other for contribution.

The learned counsel for the appellant relied on section 69 of the Indian Contract Act, for relief. Section 69 enacts :

> " A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other ".

I do not think that that section can be invoked in a case where contribution is claimed. It is only where one person pays, because he is interested in such payment, what another person is alone liable to pay, that the section can be invoked. I find that the appellant is not entitled to relief under section 69 of the Contract Act.

Under the agreement between the parties at the time of the dissolution, the liability to pay the penalty was solely that of the plaintiff. Hence even if the rule of law applicable be the rule enacted in Law Reforms (Married Women and Joint Tort-feasors) Act, 1935, the plaintiff would not be entitled to contribution from the defendant. The rule as to contribution is cancelled by the right of indemnity arising on the agreement.

The decree of the Subordinate Judge is correct, though not for the reasons given in his judgment. The appeal is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI

L. Kesava Chettiar .. *Appellant**

v.

M. M. Ramanatha Mudaliar .. *Respondent.*

Limitation Act (IX of 1908), *Article* 85 *of Schedule II—Mutual, open and current accounts—What are—Tests to decide mutuality.*

For an account between two parties to be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side those on the other being merely complete or partial discharge of such obligations.

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1. (1931) 34 L.W. 618.

* L.P. Appeal No. 128 of 1955. 30th September, 1958. 8th Asvina, 1880—Saka.

But it is not necessary that the dealing between the parties must refer either to different businesses or to distinct subject-matters. Nor is it necessary that actual reciprocal demands should have been made between the parties so long as the account is such that it could give rise to reciprocal demands. The presence of a shifting balance in an account is one of the tests of its mutuality. But its absence is not conclusive against mutuality. What the Court has to see is not whether the balance actually shifts but whether the nature of the transaction is such that it was capable of giving rise to shifting balances. In order to decide whether a particular account is mutual or not it is the essence of the transaction, that has to be looked into and the number of dealings do not count. Where a counter-claim is based on casual transactions it is the real import of the casual transactions that has to be taken note of in deciding the question whether they give rise to independent obligations or whether they are merely a mode of liquidation of the obligations already undertaken by the party.

Appeal under Clause 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Ramaswami dated 16th September, 1955 in A.A.O. No. 442 of 1953 preferred against the order of the District Court of North Arcot at Vellore, dated 29th June, 1953 in A.S. No. 377 of 1951 (O.S. No. 41 of 1951, Sub-Court, Vellore).

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

S. V. Venugopalachari, for Respondent.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This Letters Patent Appeal is directed against the judgment and decree of Ramaswami, J., in C.M.A. No. 442 of 1953. The decree in that appeal confirmed the decree of the District Judge of North Arcot in A.S. No. 377 of 1951, which reversed the decree of the Subordinate Judge of Vellore in O.S. No. 41 of 1951.

The appellant before us is the plaintiff in O.S. No. 41 of 1951. The suit was laid for recovery of a sum of Rs. 4,371-12-6 due on dealings between the plaintiff and the defendant, had from 29th April, 1946 to 26th March, 1948. The suit itself was instituted on 7th March, 1951 within three years from the date of the last dealing shown in the accounts of the plaintiff. The defendant resisted the suit *inter alia* on the ground of limitation. The plaintiff pleaded that the account between the parties was a mutual, open and current account, and that, since Article 85 of Schedule II of the Limitation Act applied, the suit was in time. He also relied on acknowledgment by part payments and contended that the suit was also saved by section 20 of the Indian Limitation Act. On the first question the learned Subordinate Judge held that Article 85 of the Limitation Act applied and granted a decree for a sum of Rs. 3,584-10-0 after adjusting payments made, which were pleaded by the defendant or were found against. The learned District Judge of North Arcot, on appeal, took a different view, and held that Article 85 would not apply for the recovery of the balance due on the plaintiff's account and remanded the suit for fresh disposal and directed the Subordinate Judge to investigate the question whether the balance claimed was otherwise saved. By this he obviously referred to the plea of saving of limitation based upon section 20 of the Indian Limitation Act.

On appeal, Ramaswami, J., confirmed the decision of the District Judge, but, in addition, went into the question of applicability of section 20 of the Limitation Act, which was based upon the construction of certain receipts signed by the defendant, which are contained in Exhibits A-5 and A-6, and concluded that these were not sufficient to save limitation. Therefore, he dismissed the suit of the plaintiff.

Mr. S. V. Venugopalachariar, learned counsel for the respondent, very properly did not invite us to examine the correctness of the view that Exhibits A-5 and A-6 series were not sufficient to constitute acknowledgments within section 20 of the Indian Limitation Act, especially when this question had not been agitated before or examined by both the Subordinate Judge and the District Judge who have dealt with this case. The arguments addressed to us referred only to the question of the applicability of Article 85 of the Indian Limitation Act.

The facts necessary for the purpose of ascertaining the applicability of Article 85 are not in dispute. The appellant-plaintiff was during the period covered by suit dealings a wholesale merchant carrying on business in yarn at Arni and the defendant respondent was a retailer in the same business at Kalambur. Throughout the period of the dealings between the parties, there was a State machinery, controlling the supply and distribution of yarn. Though there was some dispute on the pleadings as regards the period of dealings, it is now agreed that the period commenced from 29th April, 1946 and ended with 26th March, 1948. It is seen from the copy of accounts of the plaintiff that, commencing from 29th April, 1946 up till 9th October, 1946 the respondent was advancing substantial sums—a few thousands of Rupees—to the plaintiff appellant even before supplies of yarn were made by the appellant. Subsequent to October, 1946, payments made by the respondent to the appellant were mostly in the nature of payment of price for the yarn supplied. This position continued till 7th August, 1947, when, again, there appears a credit balance in favour of the respondent in the account, which means that, again, the respondent began to advance monies to the appellant. This state of account showing credit balance in favour of the respondent continued till 18th October, 1947. Thereafter, the account constantly showed a debit balance against the respondent, which means that he had not paid any advances to the appellant upto the close of the account on 26th March, 1948. On 26th March, 1948, the debit and credit sides were balanced, with the result that the accounts show a debit balance against the respondent in the sum of Rs. 4,371-12-6, which was the amount claimed in the plaint.

The question for consideration is whether the account evidencing this course of dealings between the parties amounts to a mutual, open and current account involving reciprocal demands between the parties. If the answer is in the affirmative, Article 85 of the Limitation Act is attracted and the suit would be in time.

Quite a large number of cases were cited before us, illustrating the test to be applied in determining the mutuality of the dealings beween the parties and the application of this test to individual cases. It is unnecessary for the purpose of this appeal to refer to the provisions of the English law as regards limitation in respect of mutual accounts which have been succinctly summarised by Rankin, C.J., in *Tea Financing Syndicate* v. *Chandra Kamal Bezbaruah*[1]. The definition of 'mutuality' given by Holloway, C.J., in *Hirada Basappa* v. *Gadigi Mudappa*[2], has almost become a classic, being quoted with approval in every subsequent decision both of this Court and of other High Courts. It is useful to bear this definition in mind, which runs as follows :—

"To be mutual, there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations".

Though this dictum of Holloway, C.J., was not quoted, the next case of this Court in *Lakshmayya* v. *Jagannatham*[3], applied the principle underlying this dictum. There, the plaintiff was a boat-owner, and the defendant was entrusted with the working of these boats. The defendant was authorised by the contract between the parties to receive monies payable by people using the boats, to pay expenses incurred for working the boats, and to receive commission from the plaintiff for his work. Under this agreement, the defendant worked the boats for the period from 10th January, 1879 to April 1880. Accounts were being furnished by the defendant to the plaintiff from time to time and the last such account showed a balance of Rs. 179-11-4 due to the defendant. Soon after sending the last account, the defendant called upon the plaintiff to pay the balance due to him with interest. The suit was filed on the basis of these accounts; but the plaintiff claimed money as due on the basis of an intermediate account sent by the defendant. The question arose whether Article 85 of the Limitation Act applied to the balance due on such accounts. In

1. (1931) I.L.R. 58 Cal. 649.
2. (1871) 6 M.H.C.R. 142.
3. (1887) I.L.R. 10 Mad. 199 at 200.

dealing with this question, the Bench consisting of Kernan and Brandt, JJ., observed as follows :—

"There were here reciprocal demands between the plaintiff and the defendant apparent on the accounts, *viz.*, the money received by the defendant for the earnings of the boat formed to that extent the plaintiff's demand, and the payment by the defendant at the plaintiff's request to other parties and the payment to the plaintiff and payments for the expenses of working the boats and the commission due to him, to that extent, formed the defendant's demand against the plaintiff."

It will be clear from the above that it is not necessary, for an account to be mutual, that the dealings between the parties must refer either to different businesses or to distinct subject-matters. That has been assumed both by the learned District Judge and by Ramaswami, J., in rejecting the plea that the account in this case was mutual. The District Judge observed as follows :—

"All the dealings between the parties admittedly relate to the yarn business, the plaintiff being a wholesaler and the defendant a retailer throughout. Because of the advances, the balances shifted, being sometimes to the credit of the plaintiff, and sometimes to that of the defendant. But the advances were not loans, or arising out of any independent relationship whatever ".

To the same effect is the following observation of Ramaswami, J :—

"But, throughout, there is only one single relationship, *viz.*, that between wholesaler and retailer and there is not even one transaction which arose independently or could be enforced as such ".

In our opinion, this view is not in accordance with the dictum laid down in *Lakshmayya* v. *Jagannatham*[1], cited above. As early as 1881, Sir Charles Sargent, J., of the Bombay High Court in effect approved of the definition of mutuality given by Holloway, C.J., in *Hirada Basappa* v. *Gadigi Mudappa*[2], though this decision was not actually cited in *Narandas Hemraji* v. *Vissendas Hemraj*[3], the case first mentioned. There, Sir Charles Sargent, J., relied on *Gaseram* v. *Monohardas*[4]. This early case dealt with the provision of the Limitation Act (XIV of 1859), corresponding to clause 87 of Schedule II of the Limitation Act (IX of 1871), which was the clause which Sir Charles Sargent, J., had to interpret. The difference consisted merely in that the clause in the Act of 1859 applied to suits for balance on accounts current between merchants, whereas clause 87 of the Second Schedule of IX of Act of 1871 applied to every suit brought "for the balance due on mutual, open and current account where there have been reciprocal demands between the parties". In repelling an argument that there should have been actual demands made by one party against the other for payment of the balance due, Sir Charles Sargent, J., said :—

"Literally construed, it would confine the clause to those cases only in which both parties have, in the course of their dealing, made actual demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties—in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and, sometimes, of the other ".

The language of Article 85 of the present Limitation Act IX of 1908 is in similar terms :

"For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties ".

This does not however give rise to the condition that actual demands should have been made, as on the authorities, it is undoubted that, even though there were no actual demands, the account would be mutual, provided it was such that it could give rise to mutual demands.

The observation of Sir Charles Sargent, J., quoted above, relating to shifting balances, has given rise to a conflict in later decisions. One view was that a shifting balance is a conclusive test of mutuality. The other view was that it is only one of the tests of mutuality and the absence of it does not indicate that the account was not mutual. In our view the correct rule on this point was stated as early as 1894 in

1. (1887) I.L.R. 10 Mad. 199 at 200.
2. (1871) 6 M.H.C.R. 142.
3. (1881) I.L.R. 6 Bom. 134.
4. 2 Ind. Jurist N.S. 241.

Velu Pillai v. *Ghose Mahomed*[1]. After quoting the observations of Sir Charles Sargent, J., in *Narandas Hemraji* v. *Vissandas Hemraj*[2], the learned Judges who constituted the Bench in that case explained the meaning of the observation of Sir Charles Sargent, J., thus :—

" The meaning of which is not that there must have been such a shifting balance, but such was a possible and likely incident of the mutual transactions, with regard to which the account was kept ".

This view was reiterated in *Kunhikutti Ali* v. *Kunhammad*[3]. Schwabe, C.J., who delivered the judgment in that case referred to the judgment of Mookerjee, J., in *Ramprshad* v. *Harbans Singh*[4], and quotes the discussion in the judgment of Mookerjee, J., about the shifting balance in the following passage and explains it :—

" He then enters on a discussion of the various cases on those lines and points out that ' where you have a case of shifting balance, sometimes in favour of one side, sometimes in favour of the other, it is a test of mutuality, but its absence is not conclusive proof against mutuality '. The meaning of that, as I understand it, is that, if you may get a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other ; if the balance is always in favour of one party in the very nature of the transactions, there, you have got a case where you have not separate mutual dealings."

The above quotation aptly illustrates the significance of a shifting balance as a test of mutuality. The presence of a shifting balance is one of the tests of mutuality; but, as already indicated by us, its absence may not be conclusive against mutuality, because in every case, the facts must be sifted to find out if there could have been reciprocal demands by one upon the other as a result of the dealings. The correct view on this matter is that laid down in *Velu Pillai* v. *Ghose Mohomed*[1], in the following terms, which we respectfully endorse :—

"A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality ".

That the account in this case was both open and current is admitted by both sides. Mr. Venugopalachari, learned counsel for the respondent, however, contended that the few instances where the balance was in favour of the defendant, were only casual transactions, which should not be taken as indicating an independent course of transactions. To reinforce this argument, he cited *Velu Pillai* v. *Ghose Mahomed*[1]. There, the father of the plaintiffs who was a broker had continuous dealings with the defendant from September, 1885, to 7th October, 1890. The suit was laid for recovery of the balance due on this account. Purchases were ordinarily made in that case by the defendants from the plaintiffs' father ; but, two entries were found in the plaintiffs' account, showing purchase of oil by the plaintiffs' father from the defendants. On the strength of these two entries, it was contended in that case that the account was a mutual one. In repelling this argument, the learned Judges said :—

" The amounts credited to defendants in the account kept by plaintiffs in the present case are merely payments made in reduction of the debt due from defendants to plaintiffs, and two entries of amounts due to defendants from plaintiff for oil, etc., purchased from defendants are also credited merely as items received in partial discharge of defendants' debt, to the plaintiffs. We cannot accede to the contention that they are evidence of reciprocal demands. They are casual merely and not such as would imply a regular course of reciprocal dealings."

To appreciate the significance of the alleged reciprocal demands, we must have regard to the facts of that case. The plaintiffs' account disclosed a course of dealings where the defendant had been making regular purchases from the plaintiffs' father. Numerous entries showed such purchases. During the course of these dealings, two instances of sale of oil by the defendants to the plaintiffs' father occurred, which were entered in the plaintiffs' account. But these two instances of purchase of oil were not independent transactions, but items received in partial discharge of the defendants' liability to the plaintiffs. This is the basis for the observation that the transactions were casual and would not imply a regular course of reciprocal dealings. Bearing

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1. (1893) 4 M.L.J. 140: I.L.R. 17 Mad. 293.
2. (1881) I.L.R. 6 Bom. 134.
3. (1922) 44 M.L.J. 184.
4. (1906) 6 C.L.J. 158.

this in mind, if we examine the dealings between the parties in the present case, we would see that, for a period of nearly five months at the commencement of the dealings, the defendant had been making advances to the plaintiff even at a time when no money was due by him for the supply of yarn. Again for a further period of 2½ months during August, September and October, 1947, the defendant had been similarly making payments in the nature of advances. These payments could not be construed as payments made in discharge of the liability incurred by the defendant for yarn purchased from the plaintiff. The advances made by the defendant are nearly 13 in number. They do not in our opinion answer the test of casualness laid down in *Velu Pillai* v. *Ghose Mahomed*[1].

Learned counsel for the respondent cited *Shiev Gowda* v. *Fernandez*[2], for the contention that there could be no mutuality where the course of dealings merely showed that the transactions related to only one relationship between the parties. The facts of that case are as follows: The plaintiffs were merchants and the defendants were coffee-planters. The accounts of the plaintiffs from the year 1893 showed that the plaintiffs had been financing the defendants and the defendants had been sending consignments of coffee to the plaintiffs. By January, 1894, the advances made by the plaintiffs amounted to Rs. 10,700. In that month, a consignment of coffee was received by the plaintiffs from the defendants, and, later consignments also were received. These consignments were sold by the plaintiffs, and defendants were credited with the sale proceeds with interest. A balance was struck in May, 1894, which included debits against the defendants for interest due on monies advanced by the plaintiffs, and also with what was termed commission. This was not really commission, but an amount calculated at Rs. 2 per candy, every Rs. 1,000 advanced being taken as equivalent of 30 candies in respect of advances before any coffee was received by the plaintiffs, and every Rs. 1,000 being taken as equivalent of 10 candies in respect of advances made subsequently. Ultimately, in November, 1899, the balance shown in the plaintiffs' accounts was a sum of Rs. 7,500 and odd due by the defendants, for which the suit was brought. On these facts, the Bench held that the relationship between the defendants and the plaintiffs was not that of seller and buyer as regards the coffee consigned to the plaintiffs, nor that of principal and agent in respect of the coffee sold by the plaintiffs. The Bench ruled that the contract between the parties was that the plaintiffs should finance the defendants and the defendants should keep the plaintiffs secured in respect of the advances made by the plaintiffs on their behalf by consigning to them coffee of a value equal to the amount of their indebtedness, the defendants being given credit for the prices of the coffee as and when sold by the plaintiffs, and if the defendants failed to do this, they should make further payment of what is called commission, which was really a payment by way of damages. On these findings, the conclusion reached was that there were no independent obligations on both sides. The consignment of coffee by the defendants was really in discharge of the obligation, under which they already lay, namely, the obligation to repay the advances made by the plaintiffs. Throughout, the parties kept the position of the plaintiffs being a creditor and the defendants being a debtor and the consignment of coffee was only one of the methods of repayment of the obligation of a debtor towards the creditor. This decision, therefore, does not help the respondent, because, in the present case, it cannot be construed, as we would show presently, that, when the advances were made by the defendant to the plaintiff they were actually made for the discharge of any obligation already undertaken by the defendant or as the result of any agreement relating to the business of sale and purchase of yarn.

Both the learned District Judge and Ramaswami, J., have construed the advances made by the defendants as not giving rise to any independent obligation, because they thought that the advances were really intended to secure supplies of yarn. In one sense, they are right. Clearly, this is not a case where the defendant made the

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1. (1893) 4 M.L.J. 140: I.L.R. 17 Mad. 293. 2. (1910) 21 M.L.J. 391: I.L.R. 34 Mad. 513

advances intending them to be loans. But that is not the distinction which matters. It is common ground that, neither by reason of contract nor by reason of agreement of parties, the defendant was under a liability to make any advances to secure supplies of yarn. The mere fact that the monies were not paid as loans would not lead to the inference that they do not give rise to any independent obligation on the part of the plaintiff. Ramaswami, J., in one portion of his judgment, observed as follows :—

> "One test of this (what the learned Judge refers to was the existence of an independent relationship, apart from that of a retailer and wholesaler, between the parties) is that, during the relevant period, the defendant could not have filed a suit against the plaintiff for recovery of the advances as such and independently of the yarn transactions."

With all respect to Ramaswami, J., we do not agree that the defendant could not have maintained a suit for the recovery of the advances, independent of the supply of yarn. Clearly, even though the advances in this case are not monies lent, they are at least monies had and received for the use of the defendant. Unless the facts show that the advances were paid under an obligation to pay for the future purchase of yarn, the receipt of money by the plaintiff—we are referring to the advances—creates an obligation on the part of the plaintiff to return the money. Though, in fact, this was not a uniform course of dealings between the parties—and, in one sense, we may agree that the defendant did not intend the advances to be repaid in cash—yet, the crucial test is, what are the obligations that arise in law by reason of payment of advances by the defendant and the acceptance of such advances by the plaintiff. Only two consequences can follow. If the payments were made under a contract, that is to say, under a duty cast by the contract upon the defendant to make such payments, certainly, the right to recover these monies would depend upon the terms of that contract. If that contract provided that the payments should be liquidated by future supplies of yarn, money so paid could not be properly described as money had and received by the plaintiff for the use of the defendant. It is true that, as already pointed out by us, the advances are not loans obtained by the plaintiff. But, once there was no obligation on the part of the plaintiff to supply yarn in spite of the fact that he had accepted the advances, the only other alternative is that, by the fact of acceptance of these advances, the plaintiff had put himself under a liability to return money received for the use of the defendant. That no such demand was actually made by the defendant during the course of the dealings—and we may even say that that was not the intention of the defendant in making the advance—is not material for our purpose. Intention in a case of this kind becomes relevant only if it helps to understand a contract or agreement concluded between the parties. In the absence of any such contract or agreement, whatever might have been the intention of the defendant in making the advances, so long as he did not intend to make a gift of the monies, in law, the obligation on the part of the plaintiff to return the money arises. This obligation could certainly have been enforced by a suit, if the defendant was so minded. The fact that no such demand for return of the money was made is not material in determining the relationship between the parties. To illustrate the distinction we draw, we may refer to the facts in *Tea Financing Syndicate* v. *Chandra Kamal Bezbaruah*[1]. There, the plaintiffs were a limited company called Planters' Agency Company, the defendant was the proprietor of a tea estate in Assam. Under a deed of hypothecation dated 3rd February, 1920, the plaintiffs undertook to make advances to the defendant to an extent not exceeding Rs. 80,000 to enable him to work and carry on the tea estate ; but it was expressly provided in the deed that the plaintiffs might discontinue the advances as and when they considered it expedient with one month's notice to the defendant. By the deed of hypothecation, the defendant hypothecated to the plaintiffs the entire tea crop for the season 1920 and the produce thereof, and agreed to send the tea grown in his estate, as soon as it was manufactured, to the plaintiffs, in order that it might be sold in Calcutta by the plaintiffs by public auction. It was further declared by the hypothecation deed that, until the tea shoud be so consigned and transmitted, the defendant would hold it in trust for the plain-

1. (1931) I.L.R. 58 Cal. 649.

tiffs and at the plaintiffs' absolute order and disposal. It was further agreed under the hypothecation deed that the defendant's account in the plaintiffs' book should be made up with interest at 9 per cent. per annum with half-yearly rests and that all costs, charges and expenses incurred by the plaintiffs in connection with the security and the amount for the time being due to the plaintiffs on the said account should be repaid by the defendant to the plaintiffs on demand, or, if no demand be made, within one year from the date of the deed. The plaintiffs alleged that, in pursuance of this arrangement, they had advanced monies to the defendant and had received from the defendant consignments of tea, the proceeds of which, after sale, they had credited to the defendant. Such dealings commenced from 3rd February, 1920 and ended on 30th June, 1921. For the balance due on such account, the suit was brought. The defendant, among other grounds, resisted the suit on the ground that the plaintiffs' account was not a mutual, open and current account. Except the agreement between the parties evidenced by the hypothecation deed, there was no other or further agreement between them. Considering the nature of this account between the parties, Rankin, C.J., observed thus :

> "In my opinion, the plaintiffs' liability to account to the defendant for the proceeds of the tea sold by them was an independent obligation, and the circumstance that they were expected and intended to apply such sums as would be necessary in liquidation of their advances does not mean that this was an account in which the obligation were all on one side as distinct from an account in which there are cross-claims or reciprocal demands."

We are in respectful agreement with this view, and we would sum up the legal position thus :

(1) To constitute a mutual account between two parties, the essence of the transactions should be looked at in order to find out if independent obligations arise on both sides resulting in possibility of reciprocal demands, even though the transactions may relate to the same commodity or to the same kind of business.

(2) Before deciding whether a particular course of dealings is a continuous course of transactions independent of the other transactions involved in the case, the number of dealings do not count to decide whether the counter-claim arises upon casual transactions: the real import of the casual transaction should be taken note of in deciding the question whether they give rise to independent obligations or whether they are merely a mode of liquidation of the obligation already undertaken by the party.

(3) A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality. The real point to be noticed is not whether balances actually shifted, but whether the nature of the transactions was such that it was capable of giving rise to shifting balances.

(4) The absence of actual reciprocal demands would not matter, because the point to be considered is whether such demands were capable of being made on the account by one party upon the other.

Applying these principles, we hold that, in this case, though the advances were intended to procure supplies of yarn and eventually to liquidate the price of the yarn supplied by the plaintiff to the defendant, this would not mean that the obligation to return the advance was non-existent or was not independent of the obligation arising under the sale and purchase of yarn. The legal import of the transactions between the parties is such as to give rise to cross-claims or reciprocal demands. With all respect to Ramaswami, J., was are of opinion that this is a case where the application of Article 85 of the Limitation Act is called for, and the balance claimed in suit was within time. In view of this it is not necessary to deal with the other question whether Exhibits A-5 and A-6 were sufficient to save limitation under section 20 of the Limitation Act.

The appeal is allowed. The decrees of Ramaswami, J., and of the District Judge of North Arcot are set aside, and the decree of the learned Subordinate Judge of Vellore is restored. The costs of the appellant in this appeal and before Ramaswami, J., and the District Judge of North Arcot will be paid by the respondent.

This appeal having been set down for being mentioned this day, the Court made the following Order :—

It is represented to us that the respondent is an agriculturist and entitled to relief on that ground in the matter of enforcement of the decree. As the plea involves question of fact, we are not in a position to deal with it. The respondent will be at liberty to take such steps as may be open to him to obtain a relief on the ground that he is an agriculturist in appropriate proceedings.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER.

Mir Mohd. Ali, Bus Owner, Vellore ... *Applicant**

v.

The Commissioner of Income-tax, Madras *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (2) (vi) *and section* 10 (2) (vi) (*a*)—*Depreciation admissible under—Diesel engine fitted to motor vehicles in replacement of existing engines—Additional depreciation—If could be claimed—' Machinery '—What is.*

In the absence of a statutory definition the normal meaning of the word ' machinery ' should be given to the expression in section 10 (2) (vi) of the Income-tax Act and the word must be given the same meaning in both the sub-sections, *viz.*, section 10 (2) (vi) and section 10 (2) (vi) (*a*). A diesel engine fitted to a motor vehicle is ' machinery ' within the meaning of the section. Machinery does not cease to be so merely because it has to be used in conjunction with one or more machines nor does it cease to be machinery merely because it is installed as part of a manufacturing or industrial plant.

Maneklal Vallabadas Parekh v. *Commissioner of Income-tax,* (1959) 37 I.T.R. 142, differed.

Hence an assessee, a bus owner, is entitled to the claim of depreciation both under section 10 (2) (vi) and section 10 (2) (vi) (*a*) of the Income-tax Act in cases where he has fitted diesel engines to his motor vehicles in replacement of the existing engines and the fact that the diesel engines were part of the motor vehicle is not relevant in deciding the claim for depreciation allowance. The diesel engines being ' machinery ' the assessee will be entitled to claim the statutory allowance for depreciation.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), in R.A. Nos. 931, 932 and 933 of 1955-56 on its file, for decision on certain questions of law.

S. Swaminathan, for Applicant.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—The first of the two questions referred to this Court under section 66 (1) of the Income-tax Act was :

" Whether on the facts and in the circumstances of the case, the disallowance of any portion of payment of interest of Rs. 12,541 in the first year, Rs. 20,851, in the second year, and Rs. 40,302, in the third year, on the amounts borrowed by the assessee for the purpose of his business is correct?"

That factually the assessee paid Rs. 12,541 in the first year (the account year ending with 31st March, 1949) Rs. 20,851 in the second year and Rs. 40,302 in the third year towards interest on the loans he had contracted was apparently accepted by the Tribunal. What was ultimately allowed by the Tribunal as deduction was Rs. 8,000 in the first year, Rs. 14,000 in the second year and Rs. 13,000 in the third year. The question is whether the claim of the assessee should have been allowed in full.

The accounts of the assessee were rejected as unreliable and the gross income of the assessee had to be estimated under the Proviso to section 13 of the Act in each of the three assessment years. The Assistant Commissioner and the Tribunal rightly overruled the view of the Income-tax Officer, that under such circumstances nothing was allowable as deduction, though the assessee had expended the amounts in ques-

* Case Referred No. 82 of 1956.

16th November, 1959.
(25th Kartika, 1881—Saka.)

tion to meet the interest charges. But how much of the loans was borrowed for the transport business of the assessee, he had to prove and while no accounts were produced for the third year, the books produced for the first two years were rejected as unreliable. The Tribunal had therefore necessarily to estimate how much of the payments represented interest on loans borrowed and utilised for the transport business of the assessee. It was for the assessee to prove that each of the loans on which he paid interest in the years in question was utilised for his business and that burden the assessee did not discharge. There is really no material on record to sustain any possible contention, that the estimates ultimately upheld by the Tribunal were unreasonable. We have to answer the first question in the affirmative and against the assessee.

The second question which related only to the assessment year 1950-51 ran :

"Whether extra depreciation is admissible under the provisions of section 10 (2) (vi) (*a*) of the Income-tax Act, in respect of a diesel oil engine fitted to a motor vehicle in replacement of the existing engine".

The relevant facts were not in dispute. In the year of account ending with 31st March, 1950, the assessee replaced the petrol driven engines in two of his buses MDJ 593 and MDJ 723 by new diesel engines and he incurred an expenditure of Rs. 18,544 on the purchase of these two diesel engines. He claimed deductions for the depreciation allowances permitted by paragraph (1) of section 10 (2) (vi) of the Act (normal or initial depreciation) paragraph (2) of section 10 (2) (vi) of the Act (additional or extra depreciation) and by section 10 (2) (vi) (*a*) (additional and special depreciation). The claim for normal depreciation was allowed by the Income-tax Officer himself, but he disallowed the claims under the other two heads, and that disallowance was ultimately confirmed by the Tribunal. The question as it has been framed by the Tribunal would appear to refer only to the disallowance of the claim under section 10 (2) (vi) (*a*) and not the disallowance of the claim under paragraph (2) of section 10 (2) (vi). Quite obviously it was an accidental slip, because what the Tribunal stated in its order on appeal was :

"In our opinion the assessee is not entitled to extra-depreciation under section 10 (2) (vi) or 10 (2) (vi) (*a*)........"

So we amended the question and the amended question runs :

"Whether extra depreciation is admissible under the provisions of section 10 (2) (vi) and section 10 (2) (vi) (*a*) of the Income-tax Act in respect of the diesel oil engines fitted to the motor vehicles in replacement of the existing engines?"

Sections 10 (2) (vi) and 10 (2) (vi) (*a*) of the Act provided for allowance for depreciation of machinery and plant among other things which belonged to the assessee and which he utilised for his business. While section 10 (5) of the Act defines the expression, plant "plant excludes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation" the term 'machinery' itself has not been given any statutory definition. It should however be obvious that the word machinery must be given the same meaning with reference to each of the three statutory provisions we have now to consider, paragraphs (1) and (2) of section 10 (2) (vi) and section 10 (2) (vi) (*a*). If the diesel engine was machinery for the normal depreciation for which the first paragraph of section 10 (2) (vi) provided it should continue to be machinery also for the additional allowances for depreciation under second paragraph of section 10 (2) (vi) and section 10 (2) (vi) (*a*). In the absence of a statutory definition the normal meaning of the word machinery has to be accorded to it.

In *Corporation of Calcutta* v. *Chairman, Cossipore and Chitpore Municipality*[1] their Lordships of the Privy Council stated at page 201 :

"Their Lordships concur with Lord Davey in thinking that there is great danger in attempting to give a definition of the word 'machinery' which will be applicable in all cases. It may be impos-

1. (1921) L.R. 48 I.A. 435 : I.L.R. 49 Cal. 190 (P.C.).

sible to succeed in such an attempt. If their Lordships were obliged to run the hazard of the attempt, they would be inclined to say that the word ' machinery ' when used in ordinary language *prima facie*, means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result."

That may not be an exhaustive test. But even judged by that test a diesel engine is certainly machinery.

The learned counsel for the assessee drew our attention to the decision of the Court of Appeal in *Maden and Ireland, Ltd.* v. *Hinton*[1]. The headnote runs :

" The appellant carried on business as a manufacturer of boots, shoes and slippers. A number of heavy machines were used in the business, and the knives and lasts were inserted into the machines. The knives wear on quickly and have to be replaced frequently. Every type of shoe requires its own shape of knife and last. The machines cannot function without the knives and lasts, and the knives and lasts are useless except when placed in the appropriate machines..........

It was contended on behalf of the respondent that the expenditure on the knives and lasts was not expenditure on capital account, but on revenue account ; and that they were not parts of the machines, but were chattels. It was contended on behalf of the appellant that the expenditure was on capital account, since it was expenditure on machinery or plant, and so was entitled to an investment allowance.........."

The Court of Appeal held (1) that the knives and lasts were machinery or plant ; (2) that the expenditure was capital expenditure ; and (3) that an investment allowance should be made in respect of that expenditure. The investment allowance the Court of Appeal had to allow was something analogous to the additional depreciation allowance for which section 10 (2) (vi) (*a*) provided. We have referred to this case only to emphasise what their Lordships of the Privy Council pointed out in *Corporation of Calcutta* v. *Chairman, Cossipore and Chitpore Municipality*[2], that it may not be possible or desirable to give an exhaustive definition of the word 'machinery '. It may not however be necessary to extend the principle laid down by the Court of Appeal in *Maden and Ireland, Ltd.* v. *Hinton*[1], to decide whether diesel engines constituted machinery within the meaning of section 10 (2) (vi) and 10 (2) (vi) (*a*) of the Income-tax Act.

The further requirement of the second paragraph of section 10 (2) (vi) is that the machinery being new must have been installed between 1st April, 1946 and 31st March, 1956. Section 10 (2) (vi) (*a*) applies to new machinery installed after 31st March, 1948. We had to consider in *Commissioner of Income-tax* v. *Messrs. Sri Rama Vilas (P.) Ltd., Madras*[3], the scope of the statutory requirement of 'installed' and judged by that test we have to hold that the diesel engines were 'installed' when they were fitted to the buses to run them.

Of the reasons given by the Tribunal for disallowing the claim for additional depreciation only one requires consideration. The others were really irrelevant, for example, that the assessee did not show in his books the sale price of the old engines, or that he did not show that anything was wrong with the old petrol driven engines. While it was not necessary that the assessee should prove that the installation of diesel engines improved immediately the profit earning capacity of the buses, even that was satisfied in this case, the Tribunal stated ;

" In our opinion the assessee is not entitled to extra depreciation under section 10 (2) (vi) or 10 (2) (vi) (*a*) because however important the engine might be for the running of a motor car, it is after all part of an equipment and it cannot by itself become 'machinery' for the purpose of claiming extra depreciation as envisaged in those two sub-sections ".

Virtually the same idea was put in different words by Mr. Rama Rao Saheb, learned counsel for the Department. He pointed out that the bus was a plant within the meaning of sections 10 (2) (vi) and 10 (2) (vi) (*a*). He urged that, when the diesel engine became part of that plant, no separate depreciation could be claimed on

1. (1958) 37 A.T.C. 317. 190 (P.C.).
2. (1921) L.R. 48 I.A. 435 : I.L.R. 49 Cal. 3. (1960) 1 M.L.J. 325

a part of that plant, that is, the diesel engine fitted to that vehicles, and the assessee's only right thereafter was to claim depreciation of the plant as a whole. On the plant, that is, the bus, only the normal depreciation would be permissible, and not the additional depreciation for which the second paragraph of section 10 (2) (vi) and section 10 (2) (vi) (*a*) provided. The buses had been acquired anterior to 1946.

The contention of the learned counsel for the Department was backed by the authority of the decision of the Bombay High Court in *Maneklal Vallabadas Parekh* v. *Commissioner of Income-tax*,[1] With all respect to the learned Judges, we are unable to share the view they took on the scope of sections 10 (2) (vi) and 10 (2) (vi) (*a*).

At page 144 of the report the learned Judges observed :—

"We are also unable to agree with the alternative contention........that these diesel engines constitute 'machinery being new which has been installed'. In our view, in order that initial depreciation should be allowable on machinery, it must be a self-contained unit capable of being put to use in the business, profession or vocation for the benefit of which it is installed. In the pressent case, the diesel engines installed by the assessee do not satisfy that test".

In our opinion machinery does not cease to be machinery merely because it has to be used in conjunction with one or more machines. Nor does it cease to be machinery merely because it is, for instance, installed as part of a manufactuing or industrial plant. We have already referred to the observations of their Lordships of the Privy Council in *Corporation of Calcutta* v. *Chairman, Cossipore and Chitpore Municipality*[2], a portion of which is worth repetition at this stage ;

"..........machinery........means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power............"

We are unable to see anything in the concept of machinery as that word is understood in the English language or in the statutory provisions, sections 10 (2) (vi) and 10 (2) (vi) (*a*) of the Act, that justifies the adoption of the test formulated by the learned Judges of the Bombay High Court in *Maneklal Vallabadas Parekh* v. *Commissioner of Income-tax*[1], that the machinery must be a self-contained unit. Does an electric motor which provides power cease to be machinery because it is part of an industrial plant, and except to provide power for that plant the electric motor would be needless for the business of the assessee.? All that the statute (sections 10 (2) (vi) and 10 (2)(vi) (*a*)) requires is that it must be new machinery, and that that machinery must be used in the business of the assessee. If integration with other pieces of machinery, all of which together may constitute an industrial or manufacturing plant, does not divest that item of machinery of its character of machinery, we fail to see why any difference should be made when the integration of the machinery is with a motor bus, which was a vehicle is a plant for the purposes of sections 10 (2) (vi) and 10 (2) (vi) (*a*). It must be remembered that it is an inclusive definition of plant that has been given in section 10 (5) of the Act. We can see no basis, statutory or otherwise, for the view, that machinery loses its identity as machinery for the purpose of sections 10 (2) (vi) and 10 (2) (vi) (*a*) if it made part of a 'plant.'

Another of the contentions rejected in *Maneklal Vallabadas Parekh* v. *Commissioner of Income-tax*[1], was apparently that the diesel engine fitted into the bus was itself a plant within the meaning of sections 10 (2) (vi) and 10 (2) (vi) (*a*). The learned Judges observed:

"Evidently, the assessee has purchased diesel engines for his business and he has installed them in vehicles. Though by the definition of 'plant' vehicles are included, we would not, especially in interpreting a taxing statute, be justified in holding that what is installed in a vehicle which in substance forms part thereof would also be regarded as included in the connotation of that expression. We are therefore unable to accept the contention........that because the diesel engines are installed in the vehicles, initial depreciation is allowable to the assessee in respect of those engines".

We feel that it should not be necessary for the disposal of the case before us to consider whether a claim for depreciation could be founded on the basis, that the diesel

1. (1959) 37 I.T.R. 142. 2. (1921) L.R. 48 I.A. 435: I.L.R 49 Cal. 190 (P.C.).

engine was plant within the meaning of section 10 (2) (vi) and 10 (2) (vi) (*a*). The statutory provision for depreciation is in the alternative. Whether it is plant or whether it is machinery without its being itself a plant, the assessee is entitled to claim the statutory allowance for depreciation. We have held that the diesel engine was machinery, and that it continued to be a machinery even after it was made an integral part of the bus. That should suffice to uphold the claim of the assessee, that he was entitled to all the three classes of depreciation allowances for which provision was made in paragraphs 1 and 2 of section 10 (2) (vi) and in section 10 (2) (vi) (*a*) of the Act.

We should like to refer again to *Maden and Ireland Ltd.* v. *Hinton*[1]. The concentration there was on the question, whether the knives and lasts constituted machinery or plant. It was apparently taken for granted that if they could be brought within the scope of the statutory expression 'machinery' or 'plant' the fact that they were integrated with other machinery did not bar the grant of the allowances to which new machinery was entitled. Of course, that decision is not authority as such for the conclusion we have reached, that the diesel engines of the assessee came within the scope of the statutory expression "new machinery" and the fact that they were made parts of vehicles was not relevant in deciding whether the assessee was entitled to the further allowances for depreciation for which paragraph (2) of section 10 (2) (vi) and section 10 (2) (vi) (*a*) provided.

We answer the second question as amended by us in the affirmative and in favour of the assessee.

As neither side has wholly succeeded in this reference each party will bear its cost.

R.M. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAMACHANDRA IYER

M. S. Mariappa Nadar .. . *Petitioner**

v.

State by the Commercial Tax Officer, North Madras .. *Respondent.*

Madras General Sales-tax Act (IX of 1939), *section* 19 (2) (*f*) *and Madras General Sales-tax Rules, rules* 17 (1) *and* 17 (3-*A*)—*Assessment of escaped turnover—Authorities—Rule* 17 (3-*A*) *is within the rules making powers—Reference to wrong statutory provision—Order passed within the jurisdiction—Not invalid.*

The assessee was assessed to sales-tax on an estimated turnover on 29th March, 1954 by the "assessing authority", *i.e.*, the Deputy Commercial Tax Officer. On 6th August, 1954 the appeal preferred by the assessee was dismissed by the Commercial Tax Officer. On 12th April, 1955, the Commercial Tax Officer in purporting to exercise his revisional powers under section 12 of the Act issued a notice to him to show cause why his assessment should not be revised by the Commercial Tax Officer. On 19th March, 1956, the Deputy Commercial Tax Officer issued notice to the assessee under Rule 17 (1) of the Sales Tax Rules calling upon the assessee to show cause why the assessee should not be assessed on a turnover which had escaped assessment in the original proceedings. Apparently in compliance with rule 17 (1-A) the Deputy Commercial Tax Officer submitted the records to the Commercial Tax Officer and directed the assessee to appear before the Commercial Tax Officer. On 31st March, 1956, the Commercial Tax Officer passed an order holding that the assessee was liable to be assessed on an additional turnover. In that order no reference was made to the notice issued under rule 17 (1).

Held : Section 19 (2) (*f*) specifically clothed the State Government with the power to make rules for the assessment to tax under the Act of any turnover which has escaped assessment, the authority who should have jurisdiction and the period within which such assessment may be made. Even if there is a conflict real or apparent between rule 17 (1) and rule 17 (3-A) it cannot be said that either of the rules was beyond the rule-making power conferred on the Government by section 19 (2) (*f*).

It is well settled that even a wrong reference to a statutory provision may not invalidate the order if the authority had the requisite power to pass that order, that is the jurisdiction in the exercise of which the Authority could pass such an order.

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1. (1958) 37 A.T.C. 317.

* T.R.C. No. 33 of 1957. 25th November, 1959.
(4th Agrahayana, 1881, Saka).

Petition under section 12-B (1) of the Madras General Sales Tax Act, presented to the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 7th December, 1956 and made in T. A. No. 905 of 1956 (Appeal No. 190/54-55, C.T.O., North Madras, A-3/10208-52-53 dated 29th March, 1954, Deputy Commercial Tax Officer, Washermanpet.)

A. Shanmugavel, for Petitioner.

The Government Pleader (*K. Veeraswami*), for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—This application under section 12-B of the Sales Tax Act arises out of reassessment proceedings for the assessment year 1952-53. The petitioner-assessee was originally assessed to sales tax on an estimated turnover on 29th March, 1954. That order was passed by the Deputy Commercial Tax Officer, as the "assessing authority " appointed under the Act. The assessee appealed to the Commercial Tax Officer, who dismissed the appeal on 6th August, 1954. Subsequent to that, after an examination of the accounts of one Suruli Nadar, the Commercial Tax Officer issued a notice on 12th April, 1955, in purported exercise of the revisional powers conferred upon him by section 12 of the Act, calling upon the assessee to show cause why the assessment should not be revised by the Commercial Tax Officer. The assessee lodged his objections, one of which was that the Commercial Tax Officer who had disposed of the appeal could not himself revise his own order under section 12 of the Act. Meanwhile on 19th March, 1956, the Deputy Commercial Tax Officer issued a notice to the assessee under rule 17 (1) of the Sales Tax Rules, calling upon the assessee to show cause why the assessee should not be assessed on a turnover which had escaped assessment in the original assessment proceedings. Apparently in compliance with rule 17 (1-A) the Deputy Commercial Tax Officer submitted the records to the Commercial Tax Officer, and the Deputy Commercial Tax Officer, directed the petitioner-assessee to appear before the Commercial Tax Officer. On 31st March, 1956, the Commercial Tax Officer passed an order, holding that in addition to the turnover already assessed the assessee was liable to be assessed on a turnover of Rs. 26,993-4-0. In the order, dated 31st March, 1956, no specific reference was made to the notice issued by the Deputy Commercial Tax Officer under rule 17 (1) on 19th March, 1956. But a specific reference was made to the notice issued in purported exercise of section 12 by the Commercial Tax Officer himself on 12th April, 1955. In the body of the order itself no specific reference was made either to section 12 or to rule 17 (3-A).

The assessee appealed to the Tribunal. The Tribunal apparently viewed the order of the Commercial Tax Officer, dated 31st March, 1956, as one passed in exercise of the powers of reassessment vested in the Commercial Tax Officer by rule 17 (3-A) of the Sales Tax Rules. The Tribunal then dealt with the contention of the assessee that rule 17 (3-A) was *ultra vires* the rule making power vested in the Government, because rule 17 (3-A) vested the power of reassessment in an authority other than the assessing authority as defined by section 2 (*a*-2) of the Act. The Tribunal recorded that it was not within its competence to decide whether any rule, which had the effect of a statutory provision under the terms of section 19 of the Act, was *intra vires* or *ultra vires*. The point was therefore left undecided. On merits the Tribunal was of the view that there was no substance in the appeal. The appeal was dismissed.

Learned counsel for the assessee contended before us that the order, dated 31st March, 1956, passed by the Commercial Tax Officer must be correlated only to the notice issued by him on 12th April, 1955 and the further contention of the learned counsel was that since it was only section 12 that was invoked in the notice, dated 12th April, 1955, it was only that power that the Commercial Tax Officer exercised when he passed the order, dated 31st March, 1956. It should be taken as well settled that even a wrong reference to a statutory provision may not invalidate the order if the authority had the requisite power to pass that order, that is the jurisdiction in the exercise of which he could pass such an order. In this case, though in the preamble

reference was made to the notice issued by the Commercial Tax Officer on 12th April, 1955, the Commercial Tax Officer was obviously aware of the fact, that it was treated as a case of escaped turnover when the Deputy Commercial Tax Officer issued notice on 19th March, 1956 and submitted the papers thereafter to the Commercial Tax Officer in compliance with the requirements of rule 17 (1-A). Therefore, the failure to quote specifically rule 17 (3-A) does not invalidate the order. Nor does it make the order, dated 31st March, 1956, any the less an order passed in the exercise of the powers vested in the Commercial Tax Officer by rule 17 (3-A). The view taken by the Tribunal, that it was a case of assessment of escaped turnover in exercise of the powers vested in the Commercial Tax Officer by rule 17 (3-A), is correct and calls for no interference in revision.

The next contention of the learned counsel for the assessee was that rule 17 (3-A) was *ultra vires*. That was really based upon the definition of 'Assessing Authority' in section 2 (*a*-2) and the fact that under the notifications issued by the Government it is not the Commercial Tax Officer but the Deputy Commercial Tax Officer that is designated the assessing authority. Learned counsel, however, realised that there is no specific statutory provision for reassessment; nor was there any provision prescribing the authority who alone could undertake the statutory duty of reassessment.

Section 19 (2) (*f*) specifically clothed the State Government with the power to make rules for the assessment to tax under this Act of any turnover which has escaped assessment and the period within which such assessment may be made. It was in exercise of this power that rule 17 of the General Sales Tax Rules was made and subsequently amended by the incorporation of sub-clauses (1-A) and (3-A). Now there can be no doubt that in the exercise of the powers conferred on the Government by the section 19 (2) (*f*) it can provide for assessment of escaped turnover, and it can also by rules prescribe the authority who should be clothed with the jurisdiction to make such assessment. Rule 17 (1) as originally promulgated invested only the assessing authority with the jurisdiction to assess escaped turnover. Subsequently rule 17 was amended, and rule 17 (3-A) vested the power to assess escaped turnover, in the circumstances, mentioned therein, on the appellate and revisional authorities referred to in sections 11 and 12 of the Act. Sub-rule (1-A) was virtually ancillary to sub-rule (3-A) and sub-rule (1-A) directed the assessing authority to submit to the appellate or revisional authority, as the case may be, the cases where an assessment of escaped turnover was called for, and where the assessment of the assessing authority had merged in an appeal or a revisional order.

Even if there is a conflict apparent or real, between rule 17 (1) and rule 17 (3-A), it cannot be said that either of the rules was beyond the rule-making power conferred on the Government by section 19 (2) (*f*). We have already pointed out that under the powers vested in the Government by section 19 (2) (*f*) it could provide for assessment of escaped turnover and also prescribe the authority which could make such assessment. To illustrate our point, if rule 17 (1) itself had been amended to provide for assessment of escaped turnover not only by the assessing authority but also by authorities superior to it, that is, the appellate or revisional authorities specified in sections 11 and 12, we have no doubt that such a rule would have been *intra vires*. Merely because the authorities other than the assessing authority mentioned in rule 17 (1) have been specified in a separate rule, and the exercise of the authority was subjected to further conditions, it cannot be said that rule 17 (3-A) was beyond the rule-making power of the Government.

Learned counsel for the assessee referred to *Manepalli Venkatanarayana* v. *State of Andhra*[1], in support of his contention, that rule 17 (3-A) was *ultra vires*. But in the Andhra Act, the Act itself contained section 14 (4), which in effect was a reproduction of what is rule 17 (1) in the Madras General Sales Tax Rules. That is, the Act itself provided in Andhra that escaped turnover shall be assessed only by the assessing authority. Obviously a rule framed by the Government cannot conflict with a specific statutory provision vesting jurisdiction to assess escaped turnover

1. (1959) 10 S.T.C. 524: (1959) 2 An. W.R. 467.

in a specific authority, the assessing authority. We have already pointed out that the Madras Act did not contain any specific statutory provision either prescribing the officer who should assess escaped turnover or even specifically providing for the conditions under which escaped turnover could be assessed. Thus the position is that rule 17 (1-A) and rule 17 (3-A) of the Madras Sales Tax Rules do not conflict with any express statutory provision in the Madras General Sales Tax Act. There is therefore no scope for applying to this case the principle laid down by the learned Judges of the Andhra High Court.

Since the validity of rule 17 (3-A) was the only substantial point taken in the proceedings before us and that fails, the petition has to be dismissed. The petition is dismissed with costs. Counsel's fee Rs. 100.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR AND MR. JUSTICE SUBRAHMANYAM.

Visweswaraswami and Veeraraghavaperumal Devasthanam, Tiruppur, by Trustee R. V. Easwaramoorthy Gounder .. *Petitioner**

v.

The Collector of Coimbatore District, and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXX of 1951), *section* 35 (2)—*Power of Collector to resume and regrant lands granted in inam for performing pooja in temple—Property in possession of strangers who had perfected title by adverse possession—Effect—Limitation.*

Assuming that the power conferred by section 35 (2) of the Madras Hindu Religious and Charitable Endowments Act on the Collector to resume and regrant the lands grants in inam by former Rulers of the country for the performance of pooja in a temple cannot be exercised in relation to lands which, on the date of the Collector's proceedings are in the possession of persons unconnected with the services or the temple on the ground that such persons have acquired an indefeasible title by adverse possession, such possession should have been held for 60 years prior to the coming into force of Madras Act, XI of 1934, by which section 44-B was introduced in Madras Act, IX of 1927.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Order of the Collector of Coimbatore (the 1st respondent herein), in his proceedings No. 5692/C-7, dated 5th September, 1957, reversing the Order of the Sub-Collector, Pollachi, in R.D. No. 14460/55-F, dated 19th December, 1956 and quash the said order of the Collector of Coimbatore.

T. V. Balakrishnan and *N. Vanchinathan*, for Petitioner.

The Additional Government Pleader (*M. M. Ismail*), for Respondents 1, 9 and 10.

V. Vedantachari and *A. Narayanaswami*, Advocates, for the Respondents 2 to 4, 6 and 8.

The Order of the Court was made by

Subrahmanyam, J.—This is a Petition by the trustees of the Visweswaraswami and Veeraraghavaperumal Devasthanam, Tirupur, that the order passed by the District Collector, Coimbatore, on 5th September, 1957, in his Proceedings No. 5692/57-C-7, be removed to the file of this Court and the said order be quashed.

Survey Nos. 163 and 165 of Tirupur Village, which correspond to present Town Survey Nos. 902 and 899 of Tirupur Town, were granted in inam to Sri Visweswaraswami by Hyder Nawab of Srirangapatam for the performance of pooja in the temple of the Swami at Tirupur. The Inam Commissioner found that the temple was in existence and the service was being performed and that the person who was the archaka in the temple at that time was one Kumaraswami Ayyan, a minor aged

* W.P. No. 88 of 1958. 14th December, 1959. (23rd Agrahayana, 1881—Saka.)

five years, who was having the services performed by a gumastha called Kuppayyan. The inam was confirmed to the archaka so long as he continued the performance of the service and Inam title deed No. 1052 was issued in his name in December, 1863.

On application made by the trustee of the temple in 1956, the Sub-Collector of Pollachi found, after enquiry held by him as Collector under section 35 (2) (*a*) of Madras Act, XXX of 1951, that the descendants of Kumaraswami were not performing and had not arranged for the performance of pooja in the temple; that pooja was being performed by some other persons; that the inam lands had been alienated and that the alienees were in possession of the lands. Since the lands had been granted in inam for the performance of pooja, the Collector decided on resumption and regrant of the inam lands. Accordingly he passed an order under section 35 (2) (*a*) of Act, XXX of 1951, holding that the holder of the inam had failed to perform or to make necessary arrangements for the performance of the archaka service in the temple and that the lands had been alienated and directing that the inam be resumed and be regranted as an endowment to Sri Visweswaraswami temple. On appeal by the persons in possession of the inam lands, to the District Collector, the District Collector set aside the order of the Collector in regard to a half of each of the lands, namely, Survey Nos. 163 and 165. The trustee applies that the order of the District Collector be quashed in so far as it modified the order of the Collector.

The District Collector finds that a half of Survey No. 163 and a half of Survey No. 165 "had got into the hands of persons who were strangers to the archaka service as early as in 1883" and that the alienees had perfected their title as regards those portions of the lands by adverse possession before the coming into force of Act, XXX of 1951. In the judgment pronounced by us today in W.P. No. 434 of 1957, we have held that, assuming that the power conferred by section 35 (2) on the Collector to resume and regrant the lands granted in inam by former Rulers of the country for the performance of pooja in a temple cannot be exercised in relation to lands which, on the date of the Collector's proceedings, are in the possession of persons unconnected with the services or the temple on the ground that such persons have acquired an indefeasible title by adverse possession, such possession should have been held for 60 years prior to the coming into force of Madras Act, XI of 1934, by which section 44-B was introduced in Madras Act, IX of 1927. On the District Collector's findings, adverse possession proved by the contesting respondent did not extend to sixty years and was therefore not of sufficient duration to confer on them an indefeasible title. The District Collector's order is liable to be quashed for errors of law appearing on the face of the record.

The order is hereby quashed. No costs.

K.S. ——— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMACHANDRA IYER.

S. Parameswaran .. *Petitioner**

v.

S. Sarveswaran and others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *section* 36 (1)—*Suit for accounts of dissolved partnership—Estimate of value of his share relief by plaintiff—Court, if can go behind.*

While it is true generally that a Court is not bound by the valuation of the relief given by the plaintiff its power to go behind it is also limited to ascertaining the real value from the allegations in the plaint, which should be assumed to be correct for the purpose. Its power is limited only to ascertain the plaintiff's estimate and not to substitute its own estimate. If the estimate given by a plaintiff is on the face of it a sham one or so obviously wrong the Court can ask the plaintiff to make a proper estimate. But mere inaccuracy in the estimate will not make it a sham one and it is not for the Court

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* C.R.P. No. 1027 of 1958. 1st July, 1959.
(10th Asadha 1881—Saka.)

to embark upon an inquiry as to the result of an account taking. Reality and not accuracy is the test for ascertaining a proper valuation under section 36 (1) of the Madras Court-fees and Suits Valuation Act.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court, Madras (III Assistant Judge), dated 9th May, 1958 and made in O.S. No. 26 of 1956.

M. S. Venkatarama Ayyar and *V. Krishnan*, for Petitioner.

A. Ramachandran for *Messrs. Row and Reddy* and *V. Ramaswami*, for the Additional Government Pleader (*M. M. Ismail*), for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision petition at the instance of the plaintiff against the order of the lower Court directing the petitioner to pay the Court-fee on Rs. 32,000 less the Court-fee already paid on the plaint.

The plaintiff filed a suit for accounts of a dissolved partnership from 1948 up to the date of the suit and to have the assets realised including therein the goodwill, plant and machinery which according to him were wrongfully taken over by the defendants. In paragraph 22 of the plaint it was stated that the plaintiff estimated his share of the assets payable to him in the sum of Rs. 8,000. A Court-fee of Rs. 600 was paid under section 36 (1) of the Court-fees Act of 1955. There was also an undertaking to pay an additional Court-fee after the ascertainment of the amount due by him. The first defendant contested the correctness of the valuation of the plaint. Issue 15 was raised as to the proper Court-fee payable on the plaint. The learned Assistant City Civil Judge held that the proper value on the basis of the plaint would be a sum of Rs. 32,000 and required the plaintiff to pay the additional Court-fee thereon. The plaintiff has filed this Civil Revision Petition challenging the correctness of the order requiring an additional Court-fee. The finding of the learned Judge was that the plaintiff's share in the partnership business would come to Rs. 32,000. This was based on the allegations contained in paragraph 14 of the plaint. The case of the plaintiff was that although he was a partner, he was practically excluded from taking part in the affairs of the firm, and that on 22nd July, 1954, one of the defendants acting at the instance of the others sent a notice of dissolution of the firm. In paragraph 14 of the plaint the plaintiff gave instances of certain transactions followed by some adjustments in the accounts by the defendants. It is necessary to refer to that paragraph for the purpose of appreciating the points in dispute in the present case. Paragraph 14 of the plaint runs as follows :—

"Accordingly on the 12th August, 1954, a meeting was held and with their united strength, the defendants decided upon the dissolution of the firm and proceeded to a series of steps to try to deny and deprive the plaitnitff of his just share in the assets of the firm.

(i) As Manager, the plaintiff had been given bonus, dearness allowance and holiday wages from 1947-48 to 1950-51, *i.e.*, during a period of his management, year after year, aggregating to Rs. 1961-6-0 with the consent and to the knowledge of all the partners. After the said amounts has been appropriated and paid and spent, they now claim to have discovered the irregularity and proceeded to reverse it and debit the amount personally to the plaintiff.

(ii) In order to wipe out his share, the defendants decided that the goodwill which had been valued at Rs. 1,25,099-9-6 and which had stood for several years should be wiped out and each partner was to be debited his own sixth share of the amount, thus taking away at one stroke from the plaintiff Rs. 20,833-5-4.

(iii) Lastly they also seem to have decided that all the plant and machinery should be valued and sold to themselves at Rs. 84,000 which did not represent the real value at all and which was really worth not less than one and a half lakhs. Neither the resolution nor the sale was communicated, to the plaintiff, nor was his consent obtained."

In that paragraph three instances of manipulations of accounts and improper dealing with the partnership property are given. Such instances do not by themselves show what exactly would be the share of the plaintiff if an account were to be taken from 1948 to the date of the suit. It may be that even if the plaintiff's case were to be accepted in regard to the three instances set out in paragraph 14, the plaintiff might not get more than Rs. 8,000, the amount estimated by him in the

plaint. The amount due to the plaintiff could be ascertained only after the entire accounts were taken. The only other averment in the plaint in regard to the valuation of the relief as to accounting is contained in paragraph 22 of the plaint. That gives the value of the relief as to accounting in a sum of Rs. 8,000. There is nothing in the other portions of the plaint, which would entitle the Court to depart from that valuation. The conclusion arrived at by the learned Assistant City Civil Judge that the real estimate of the relief which the plaintiff seeks should be Rs. 32,000 cannot be accepted.

The conclusion arrived at by the lower Court was supported by the learned advocate appearing for the contesting defendants and for the Government. It was first contended that the estimate given by the plaintiff in the plaint could not be accepted as final and that under the Court-fees Act of 1955 it would be open to the Court to embark upon an enquiry and find out the real value of the relief as to accounting. That contention was based on the provisions of section 36 (1) which runs :

"In a suit for dissolution of partnership and accounts or for accounts of dissolved partnership fee shall be computed on the value of the plaintiff's share in the partnership, as estimated by the plaintiff."

Mr. A. Ramachandran appearing for the defendants urged that although the aforesaid provision would entitle the plaintiff to give his estimate of the value, the Court would not be bound by such value and that it would have power under section 12 (1) of the Act to determine what a proper valuation would be. Section 12 (1) runs thus :

"In every suit instituted in any Court other than the High Court, the Court shall, before ordering the plaint to be registered, decide on the materials and allegations contained in the plaint and on the materials contained in the statement, if any, filed under section 10 the proper fee payable thereon, the decision being however subject to review, further review and correction in the manner specified in the succeeding sub-sections."

The effect of that provision is that notwithstanding the valuation by the plaintiff it would be open to the Court to determine the value on the basis of the allegations in the plaint. But in doing so the Court could only proceed on the allegations in the plaint which would be assumed as correct for the purpose. Its power is only to find out the estimate of the plaintiff and not to substitute its estimate for the plaintiff's. Under the circumstances neither the evidence on the valuation nor the estimate by any other party would be relevant. While it can be said that a Court would not be bound by the valuation as given in the plaint, its power to go behind it cannot extend beyond ascertaining the real value from the documents referred to in section 12 (1). Further under section 36 (1) the value to be adopted is the plaintiff's estimate and the power of the Court would extend only to ascertain that estimate. I have already indicated that in my opinion paragraph 14 of the plaint far from indicating any estimate of the relief to which the plaintiff will be entitled to only purports to give three instances of the improper entries in the accounts to justify the plaintiff's claims for having the accounts taken through Court. There is nothing on the other averments in the plaint from which it could be inferred that the plaintiff's estimate of the relief to which he was entitled was anything other than what he himself has stated in paragraph 22 of the plaint. Mr. Ramachandran then contended that under section 12 the test to be applied is what he called an objective test by the Court and not a subjective test of what the plaintiff's estimate of the relief is. I cannot agree with that contention. In cases coming under section 36 (1) the plaintiff would be entitled to make a valuation on the basis of his own estimate of the relief which he prayed. What all the Court is entitled to ascertain is whether that was the real estimate or some other amount was the estimate. In either case it should be the estimate of the plaintiff and not an estimate by the Court or be converted into an attempt to ascertain the actual value of the relief. It must be rembered in such cases, *viz.*, where relief as to accounting is prayed for, the plaintiff could only anticipate what the result of the account taking would be. He could not be expected at that stage to state or attempt to state what the actual result of the taking of the account would be.

Mr. V. Ramaswamy appearing for the Additional Government Pleader contended that on the terms of section 36 (1) itself the Court would have a power to estimate the value of the relief as to accounting. According to him, when the Legislature employed the words "estimate by the plaintiff" in substitution of the words amount at which the relief sought is valued in the plaint in section 7 (*iv*) (*f*) of the Court-Fees Act of 1870, it should be held that it was intended that the valuation, *viz.*, the plaintiff's estimate, should be one subject to acceptance by the Court; I cannot, however, accept this interpretation. If the estimate were a sham estimate, the Court can ask the plaintiff to make a proper estimate. But mere inaccuracy in the estimate cannot make it a sham one and therefore the Court would not be entitled to embark upon an enquiry as to what the result of the account taking will be so as to find out the real value of the relief. In *Button*, In re *Voss Ex-parte*[1], a question arose under the Bankruptcy Act. A secured creditor presented a petition and gave an estimate of the value of his security. That estimate was disputed by the person who opposed the petition in bankruptcy on the ground that the creditor was not entitled to present a petition as he had not the necessary qualification to rank as a creditor. Under the provisions of section 6 of the Bankruptcy Act of 1883 a secured creditor could estimate the value of his security and may sustain a petition for the balance of the debt due to him. In considering the meaning of the word 'estimate' under that section Vaughan Williams J., stated (page 605):

> "He has given an estimate, and it is admitted that his estimate is such that it is not possible to say that it is a mere sham and not a substantial estimate. It has been urged upon us that the Registrar should, when the petitioning creditor estimates his security, inquire whether the estimate is right. I think that the intention of the sub-section, which throws upon the creditor the duty of making the estimate, is to avoid the necessity of such inquiry."

In *Rex* v. *Cambridge University Council*[2], a certain local authority was given a right to obtain from the county council funds for its expenses on the basis of an estimated amount. The local authority demanded the amount calculated at the rate of 2 pence per £ (which was the rate prescribed) on the previous years rateable value. The question arose whether that could be said to be a proper estimate when no allowance regarding cost of collection of the rates was made. It was held that a calculation may properly fulfil the character of an estimate though there might be in it some ingredient of necessary inaccuracy and uncertainty. Lord Hewart, C.J., observed at page 208 thus:

> "They, I think, are to make the estimate, and they are to make the estimate upon the materials which they have, and part of those materials is the statement, which at any time they may ask for relating to the totals of the rateable values in the several areas. It matters not, I think, that having those materials and being engaged—and this I think, is a vital matter—upon the task of fixing a maximum and not any other amount, they have taken the total rateable value, multiplied it by two, and so arrived at their sum in pence. The ingredient which differentiates an estimate from an actual calculation is, I think, clearly supplied by the fact, from which there is no escape, that the board, when it makes its calculation, no matter by what method it makes it, is seeking to dip into the future and must have regard not to the product of the rate in some preceding year, but to the estimated amount which the rate would be likely to produce in a year in future."

When therefore the plaintiff purports to make an estimate in regard to what he would get on the taking of an account there would necessarily by an element of some guess or speculation. There is bound to be some kind of inaccuracy if one were to consider it in relation to the actual amount that would ultimately be found due. But if the estimate is on the face of it a sham one or so obviously wrong or if the other portions of the plaint make it clear that that is not the real estimate which the plaintiff himself had in mind it would be open to the Court to look at the plaint and ascertain what the real estimate is. But so long as there is no other averment in the plaint which renders the plaintiff's estimate a sham one or which shows that the estimate was some other amount the Court would be bound to accept the estimate as given by the plaintiff. Reality and not the accuracy is the test for ascertaining a proper valuation under section 36 (1).

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1. L.R. (1905) 1 K.B. 602.
2. L.R. (1937) 1 K.B. 201.

The result is, that the valuation given by the plaintiff and the Court-fee paid thereon is correct. This Civil Revision Petition is allowed and the lower Court is directed to proceed with the trial of the suit on the basis of the plaint. Respondents, 2 to 4 will pay the costs of the petitioner.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Govindarajan .. *Petitioner**

v.

Regional Inspector of Municipal Councils and Local Boards Vellore, and another .. *Respondents.*

Madras Village Panchayats Act (X of 1950), section 11—' Election '—Meaning of.

A number of processes are involved in an election and the word 'Election' has to be interpreted according to the context in which it appears. The word 'election' in sub-section (2) of section 11 of the Madras Village Panchayats Act would include not merely the stage or process of polling but also the process of nomination and the sub-section relating to filling of vacancy would apply in all cases where no person is elected whatever be the reason therefor. The sub-section would take effect in every case where the authorities have done everything necessary to hold an election and no person is elected either due to want of nomination, no votes being polled or all the votes polled being invalid.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings, dated the 24th/25th December, 1958 and made in R.O.C. No. 639/58-R 1, on the file of the Regional Inspector of Municipal Councils and Local Boards, North Arcot, Vellore and quash the said proceedings.

S. Mohan Kumaramangalam, K. V. Sankaran and *S. Sethuratnam,* for Petitioner.

R. G. Rajan, for the Additional Government Pleader (*M. M. Ismail*), for Respondent No. 1.

T. R. Srinivasan and *A. C. Muniswami Reddi,* for Respondent No. 2.

The Court made the following

ORDER.—The Panchayat of Meesanallur in Wandiwash Taluk has been divided into two wards under the Madras Village Panchayats Act of 1950. It was notified that nominations would be received on 19th June, 1958 and that the elections would be held on 20th June, 1958. On 19th June, 1958, only three persons filed their nomination papers for the three seats in Ward No. 1. They were therefore declared elected unopposed. For the second ward, four persons filed their nomination papers in the morning of 19th June, 1958. But in the evening of the same day all of them withdrew their nominations. In consequence it was notified that fresh elections for the second ward would be held on the 16th and 17th July, 1958, that nomination papers were to be filed on the 16th and that the election would be held on the 17th. However, on 16th July, 1958, no person filed his nomination paper. Consequently, no election could take place the next day. On 26th July, 1958, the Regional Inspector of Municipal Councils and Local Boards, North Arcot, at Vellore, wrote to the petitioner, who having been elected President of the previous Panchayat continued to function as such pending the election of a new President that since no person was elected from Ward No. 2 even in the second election, the Panchayat should elect four qualified persons to fill the vacancies in accordance with the provisions of section 11 (2) of the Madras Village Panchayats Act. Thereupon the petitioner issued notices to the members that the election would take place on 28th September, 1958. However, on 26th September, 1958, the Regional Inspector of Municipal Councils and Local Boards wrote to the petitioner informing him that the Government had issued an order cancelling the elections which had been

*W.P. No. 6 of 1959. 11th August, 1959.
(20th Srayana, 1881—Saka.)

scheduled for 28th September, 1958. The petitioner made oral representations to the Regional Inspector that the Government had no power to issue such an order. But of course the Inspector could do nothing. On 25th December, 1958, the Regional Inspector wrote to the petitioner that fresh elections would be held for the second ward on 10th January, 1959. The case for the petitioner is that under section 11 of the Act, in the situation that had arisen in Meesanallur Panchayat, the only persons competent to fill the vacancies relating to Ward No. 2 are the members who had been elected from Ward No. 1. He has therefore come to this Court for the issue of an appropriate writ to quash the order of the Regional Inspector of Municipal Councils and Local Boards dated 25th December, 1958.

There was considerable argument in the case over the scope of sub-sections (1) and (2) of section 11 of the Act and as the decision in this case would to a large extent turn on the proper construction of these sub-sections. I shall quote them in full :

"(1) If at an ordinary or casual election, no person is elected to fill the vacancy or one or more of the vacancies, as the case may be, a fresh election shall be held on such day as the Inspector may fix.

(2) If at such fresh election also, no person is elected to fill the vacancy or any of the vacancies, as the case may be, the panchayat may, in the manner prescribed, elect a qualified person to fill such vacancy."

The first question is what does the word "election" in sub-section (2) mean. A number of processes are involved in an election. We start with the notification announcing the dates for various events connected with the election. Then there is the filing of nomination papers, the receipt of nomination papers, the scrutiny of nomination papers and the acceptance or rejection of those nomination papers. The third stage would be the stage of polling and the last would be the announcement of the result. The word "election" has been used in different statutes and even in different places in the same statute to comprehend one or more of the various processes involved in an election. The scope of the word "election" as used in the District Muncipalities Act and the rules framed thereunder came up for consideration in the Full Bench case in *Selvaranga Raju* v. *Doraiswami Mudaliyar*[1]. On page 743, Anantakrishna Ayyar, J., observed as follows :

"The first question is, what exactly is the scope of what is termed "election" in the District Municipalities Act and the rules framed thereunder. In Wharton's Law Lexicon, page 312, the first meaning given to the word 'election' is 'the act of selecting one or more from a greater number for an office'. In Stroud's Judicial Dictionary, Volume II, page 609, it is stated as follows :

'In the Local Government Act of 1894, 'election' includes both the nomination and the poll (section 75)'. I think that in the Madras District Municipalities Act also, 'election' should be taken to include both the nomination and the poll. Though a restricted view of the meaning of the word 'election' was taken in some cases, I think that the view that 'election' includes both nomination and the poll was the view adopted by a larger number of learned Judges in this Court, as seen from the cases cited in the judgment of Pakenham Walsh, J. Notwithstanding the use of the words 'nomination' and 'election' in section 49, clause (2), of the Act, and speaking with all respect I think that the latter is the correct view to take. The rules framed for conduct of elections of Municipal Councillors assume that nomination of candidates is included in the election".

In *Ponnuswami* v. *Returning Officer, Namakkal*[2], Venkatarama Ayyar, J., made an exhaustive examination of the matter and summarised the position in these terms at page 788 :

"The result of the authorities then is to establish the position that though the etymological meaning of the word *election* might be limited to the act of choosing the candidate, it has an extended meaning as including the entire process which ends with the choosing. In other words it has become a term of art comprehending in its connotation the entire procedure of election. That, of course, does not mean that in any particular context the word might not be used in a narrow sense. The question is ultimately one to be decided on a construction of the statute."

In other words, it depends upon the context what the word means. Mr. Srinivasan argued that the word "election" in sub-section (2) of section

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1. (1929) 57 M.L.J. 241 : I.L.R. 52 Mad. 732 (743) (F.B.).
2. (1951) 1 M.L.J. 772 (788).

11 means polling and that if no polling has taken place, it would not be possible to say that there had been an election ; much less a fresh election within the meaning of that sub-section. I do not think this view is right. If it were so, sub-section (2) can take effect only in those very exceptional or extraordinary cases where after nominations are properly made no votes at all are polled or where all the votes polled are found to be invalid. It is hardly likely that this sub-section was intended to provide for such a situation of the kind which would ordinarily never arise. Of course, sub-section (2) as it stands would cover a case, where no votes are polled or where all the votes polled are found to be invalid. But it would also apply to a case where no candidate stands for election or where all the candidates withdrew. It seems to me that the sub-section would take effect in every case where after the appropriate authorities have done everything necessary to hold an election, no candidate is elected either by reason of the fact that no one comes forward to stand as a candidate or where no one votes for any candidate or where all the votes are found to be invalid or where for any other reason the election becomes completely infructuous with the result that nobody is elected. The word " election " in sub-section (2) would include not merely the stage or process of polling but also the process of nomination and that sub-section would apply where no person is elected whatever be the reason therefor.

Mr. Srinivasan next said that there had been no fresh election within the meaning of sub-section (2), because there had been no valid or proper notification by the appropriate authority in that regard. In view of this contention a report was called for and the Additional District Panchayat Officer, Vellore, has submitted a report which makes it plain that the requisite notifications were published in the manner prescribed by the rules. That objection also must fail.

Mr. Srinivasan next urged that the order of the Government directing that fresh elections be held on 10th January, 1959, is administrative in its nature and that therefore no writ of *certiorari* can issue. It is no doubt true that the order is not judical or quasi-judicial and that, therefore, a writ of *certiorari* which is the one the petitioner has asked for would not be appropriate. But where it is clear that the action complained of involves a contravention of the statute, an appropriate writ can be issued even though the writ of the particular kind which the petitioner has asked for may not be available to him. This argument is relevant only as regards the form of the matter and not its substance.

Mr. Srinivasan next stated that the petitioner has an adequate alternative remedy and should elections be held as directed by Government he can always file an election petition. He pointed out that under rule 11 (*c*) of the rules framed for the decision of election disputes, an election can be set aside if the result of the election has been materially affected by non-compliance with any of the provisions of the Act. The contravention of the provisions of the Act would therefore entitle him to file a petition and if he shows that the result of the election has been affected, the election can be set aside. Now, it has always been held by this Court that the existence of an alternative remedy, is only a circumstance which would influence the discretion of this Court and that it is not a matter which ousted its jurisdiction. Besides in the present case I do not consider that the existence of this alternative remedy can be regarded as in any way adequate.

Mr. Srinivasan finally argued that the petitioner is not a person who is aggrieved in any way and that therefore he has no *locus standi* to file the present petition. In support of his argument he referred to the decision of Rajagopala Ayyngar, J., in W. P. No. 1013 of 1957 (*G. Rajamannar Chetty* v. *State of Madras*). That was a case in which the petitioner, who was a member of the Corporation of Madras, had voted for a resolution and wanted that the Government should be compelled to accept it. It was held that he had not sufficient interest to maintain the petition. I do not think that this decision is applicable here. The petitioner is a member of the Panchayat having been elected from Ward No. 1 and if his contention is upheld, he along with two others would have a right to elect the four remaining members of the Panchayat. He has therefore a sufficient and proximate interest in the matter. If the order of the Govern-

ment were to stand and elections held in the manner directed by the Government, the petitioner would be deprived of the right which he along with two others has of electing four other members of the Panchayat.

In the result, the petition is allowed and the writ will issue. The Government will forbear from proceeding with the election notified for Ward No. 2 of the Meesanallur Panchayat. No costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Hazarath Sayed Shamian Sakkab Kadiri Thaikkal, Tanjore, represented by its trustee C. S. Peeran Sahib .. *Petitioner**

v.

T. B. Ibrahim Sahib (died) and others .. *Respondents.*

Madras City Tenants Protection Act (III of 1922) (as amended by Act XIX of 1955), sections 9 and 10—Suit in ejectment ending in a compromise decree—Tenant in possession under the terms of the decree—Extension of the Act—Application by the tenant under section 9 for sale of land—Maintainability.

In 1950 the landlord filed a suit to eject the tenant and to recover possession of the vacant sites in Tanjore. The tenant has put up structures thereon. The suit ended in a compromise decree which provided that the tenant should continue to be in possession for 12 years from 1st January, 1952 and after that period he should surrender possession. As a result of the extension of the Madras City Tenants Protection Act to Tanjore on 28th March, 1956, the tenant made an application under section 9 of the Act within the statutory period.

Held, the decree was one for ejectment within the meaning of section 10 of the Act, though the decree contained other provisions also and provided for ejectment after a certain period only. The statutory right which section 9 (1) provided could be claimed where the Act applied independent of the terms of any contract and subject only to the conditions in the Proviso to section 12 of the Act.

Even independent of the provisions of section 10, section 9 by itself would apply because the respondent was a tenant entitled to compensation under section 3 and against whom a suit in ejectment had been instituted within the meaning of section 9 (1) of the Act. The fact that the suit ended in a decree which provided for ejectment did not take the tenant outside the scope of section 9 (1). The decree has not been executed. The application by the tenant under section 9 of the Act is maintainable.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Tanjore, in O.P. No. 43 of 1956.

T. M. Krishnaswami Ayyar and *S. Kothandarama Nayanar*, for Petitioner.

G. R. Jagadisan, for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the landlord who owned the sites which were let to the tenant, Ibrahim Sahib, whose legal representatives have been brought on record as respondents 2 to 13. The vacant sites were leased to Ibrahim Sahib under two lease deeds, one in 1930 and the other in 1931. In 1950 the petitioner filed O.S. No. 315 of 1950 to eject the tenant Ibrahim from the sites in question and to recover possession of the sites as vacant sites. It should be remembered that Ibrahim had put up structures on the sites when he was the tenant. That suit ended in a compromise which was the basis of the decree dated 10th January, 1952. Clause 1 of the decree provided that Ibrahim should continue in possession as a tenant of the sites for a period of 12 years from 1st January, 1952, on payment of monthly rent of Rs. 60.

Clause 2 ran :

" On the expiry of the period, *i.e.*, on 31st December, 1963, the defendant do surrender possession of the said properties after removing the superstructure without any right to claim either any renewal of the lease or to any compensation for any superstructure ".

* C.R.P. No. 1362 of 1957. 14th August, 1959. (23rd Sravana, 1881—Saka.)

Clause 3 ran :

"that in default of surrendering of possession on the due date the plaintiff do recover possession through Court of the suit properties."

Clause 4 was ancillary to clause 1 and provided for the recovery of the rent reserved, Rs. 60 a month, by the institution of a separate suit, should that rent fall into arrears. Clauses 5 and 6 dealt with the question of costs, and clause 7 with the repayment of the advance paid by the tenant. Clause 8 provided for liberty to have the decree registered, but it is not clear whether either party to the suit took advantage of that provision. The decree in the suit was passed before the provisions of the City Tenants Protection Act III of 1922, as amended by Madras City Tenants Protection (Amendment) Act XIX of 1955, was extended to Tanjore where the properties lay.

Act XIX of 1955 which amended Act III of 1922 and provided for the extension of the provisions of Act III of 1922 to areas other than Madras provided for the issue of a Notification by the Government. It was common ground that the Notification extending to Tanjore the provisions of Act III of 1952 as amended by Act XIX of 1955 was issued on 28th March, 1956.

Within the statutory limit of one month prescribed by section 9 of the Act, that is, on 26th April, 1956, Ibrahim preferred an application under section 9 of the Act. The petitioner landlord contended that the petition was not maintainable. The maintainability of the application was adjudged as a preliminary issue, and by his order, dated 27th August, 1957, the learned District Munsif held that the petition was maintainable and adjourned the proceedings for adjudication of the other points at issue. The petitioner applied under section 115, Civil Procedure Code, to have the order, dated 27th August, 1957, set aside in revision.

The relevant portion of section 9 runs :

" Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted . . . . may . . . . . apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court."

The relevant portion of section 10 (1) runs :

" Sections 4, 5, 6, 8 and 9 shall apply to suits in ejectment. . . . . which are pending or in which decrees for ejectment. . . . . . have been passed, but have not been executed. . . ."

The main contention of the learned counsel for the petitioner was that the compromise decree in O.S. No. 315 of 1950 was not a decree for ejectment within the meaning of section 10. The learned counsel pointed out it was a composite decree. Clause 1 of the decree in effect provided for a 12 years' lease during which period the tenant was not liable to be evicted at all. Clauses 2 and 3 provided for the termination of the lease at the end of the twelve years' period, for the surrender of possession on the termination of the lease and for eviction through the process of Court if the tenant failed to deliver possession. The contention of the learned counsel therefore was that, since on the date Ibrahim preferred his application under section 9, there was no threat of eviction at all, the petition under section 9 was not maintainable. The learned counsel urged that the scheme that underlay Act III of 1922 was that if there was no threat of eviction, the tenant could not claim any right to buy out the landlord. On that basis the learned counsel urged that the threat to the tenant could materialise in this case only on the expiration of the period of lease for which the parties have contracted, that is, after 31st December, 1963.

Plausible though the argument sounds, I am unable to accept it. The question is, what was the statutory right of Ibrahim. The first question is, is he a tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted within the meaning of section 9 (1) of the Act. Section 10 further provides that the provisions of section 9 shall apply to suits in ejectment in which a decree for ejectment had been passed before the date on which the provisions of Act III of 1922 as amended by Act XIX of 1955 were extended to the territorial area, in this case, Tanjore. The decree in O.S. No. 315 of 1950 was not executed and could not have been executed and ejectment of Ibrahim sought on the relevant date, 28th March, 1956.

It is true that the decree in O.S. No. 315 of 1950 was passed upon a compromise between the parties which itself evidenced a fresh contract, a contract entered into before the Act was made applicable to Tanjore. That contract provided for a twelve year lease. The decree thus provided not only for ejectment on the termination of the twelve year period of lease, but also provided for the lease itself. It provided for other things as well. Nonetheless, it would appear to be a decree for ejectment within the meaning of section 10 (1) of the Act, though the execution of the decree could not be claimed till 1st January, 1964. That the decree contained other provisions does not alter the position, that the provision for ejectment, though on a future date, made it a decree for ejectment within the meaning of section 10. The logical result of accepting the contention of the learned counsel for the petitioner that if there had been any other provisions in the decree it would not be a decree for ejectment, would really lead to this position, that even a provision for payment of costs, in addition to a provision for ejectment, would take it outside the scope of section 10 (1), because it would not be a decree for ejectment pure and simple. No doubt a contract underlay this decree and the contractual rights and obligations formed the basis of the decree. If Act III of 1922 had not been extended to Tanjore, the parties would be bound by the contract that underlay the decree, in particular the provisions providing for the twelve year lease. But the statutory right for which section 9 (1) provided could be claimed where the Act applied, independent of the terms of contract, subject only to the conditions in the Proviso to section 12 of the Act. The scheme of the Act thus specifically provides for the statutory right prevailing, notwithstanding any contract to the contrary. I am not called upon to consider at this stage whether the petitioner can bring himself within the scope of the Proviso to section 12. I have referred to section 12 only to emphasise this feature, that even viewed as a contract, the compromise decree could not be relied upon to divest the petitioner of his statutory right under section 9, if he satisfied the requirements of section 9 read with section 10.

I have already pointed out that the decree in question in this case is a decree for ejectment within the meaning of section 10. The learned counsel for the respondents contended that even independent of the provisions of section 10, section 9 by itself would apply, because Ibrahim was a tenant entitled to compensation against whom a suit in ejectment had been instituted within the meaning of section 9 (1) of the Act. The fact that that suit ended in a decree which provided for ejectment did not take Ibrahim outside the scope of section 9 (1). The decree for ejectment had not been executed. The learned counsel relied on the decision of the Full Bench in *Syed Oomer Sahib* v. *Gopaul*[1]. The learned Chief Justice pointed out :

> " . . . . the tenant intended by the section is a person who is threatened with ejectment as the result of the legal proceedings instituted against him but has not, in pursuance of those proceedings, been actually ejected. It seems to me immaterial whether or not the proceedings resulted in a decree which might lead, but has not led, to an actual ejectment of the tenant."

The learned counsel referred next to *Nagammal* v. *Govindarajulu Naicker*[2], and pointed out that it could not be claimed that the petition of Ibrahim was premature and that he should have waited till the expiry of the period of lease of 12 years, because the application under section 9 had to be preferred within one month from the date on which the Notification was issued extending the provisions of Act III of 1922 to Tanjore. Both sets of contentions of the learned counsel for the respondent were well founded.

Thus the position is that, subject to the determination of the question whether the Proviso to section 12 would apply, the contract of twelve years' lease did not affect Ibrahim's right to prefer an application under section 9 of the Act. That application was maintainable both under the provisions of section 9 (1) and under section 10, and under section 9 (1) independent of section 10. The only question decided by the lower Court was whether the petition was maintainable, and the conclusion reached by the learned District Munsif was, in my opinion, right, and calls for no

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1. (1925) 47 M.L.J. 350 : I.L.R. 47 Mad. 813 (F.B.).
2. (1958) 1 M.L.J. 286.

interference in revision. As I have already pointed out, the other questions in issue between the parties have yet to be determined by the learned District Munsif.

One other argument of the learned counsel for the petitioner remains. He urged that even if the petition was maintainable, the equities in this case would justify consideration of the application after the period of the lease is over, that is, after 1st January, 1964. Under the provisions of section 9, the relevant period is the seven year period before the date of the order and not before the date of the application. If the basic principle is that the statutory right for which section 9 (1) provides, prevails against the contractual rights and obligations to the contrary, I can see no real justification to direct a postponement of the proceedings in this case so that the period of lease for which the compromise decree provided could first run out.

This petition fails and is dismissed with costs.

V.S. ——— *Petitton dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Palaniathal .. *Petitioner**

v.

R. Udayappan and others .. *Respondents.*

Madras Hereditary Village Offices Act (III of 1895), section 10 (1) *and* (2)—*Scope and effect—Office of village headman—Females—If excluded—Daughter of last office holder—Right of succession—Adaptation of Laws Order* (1950)—*Effect of—Constitution of India* (1950), *Article* 16 (2)—*Hindu Law—Succession—Mitakshara.*

A woman is not disqualified for being appointed as the headman of a village under the Madras Hereditary Village Offices Act, 1895.

Though section 10 (1) (ii) (*a*) of the Act, as it originally stood, provided that no person shall be eligible for appointment to a village office if such person is not of male sex, that clause was deleted by the Adaptation of Laws Order, 1950, as it was inconsistent with the provisions of Article 16 (2) of the Constitution.

So far as Village Offices are concerned, it must now be taken as settled that they should be dealt with, in so far as they partake of the character of property, as the separate property of the office-holder and a daughter would certainly not be excluded. There is no exclusion of female heirs under the Mitakshara Law for succeeding to the separate property of the last owner even if such property were an impartible estate.

Venkata Jagannatha v. *Veerabhadrayya*, (1921) 41 M.L.J. 1 : I.L.R. 44 Mad. 643 : L.R. 48 I.A. 244 (P.C.), applied.

Sivaganga Case, (1863) 9 M.I.A. 539 ; *Raja Jogendra Bhupati Hurri Mahapatra* v. *Nityanund Mansingh*, (1890) I.L.R. 18 Cal. 151: L.R. 17 I.A. 128 (P.C.); *Parbati Kunwar* v. *Chandrapal Kunwar*, (1909) I.L.R. 31 All. 457 : 19 M.L.J. 605 : L.R. 36 I.A. 125 (P.C.) and *Subramanya Pandia* v. *Siva Subramania*, (1894) 4 M.L.J. 152 : I.L.R. 17 Mad. 316, referred to.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed with W.P. No. 148 of 1958 the High Court will be pleased to issue writs of *certiorari* calling for the records in R. Dis. No. 14257/55 dated 23rd February, 1956, on the file of the Tahsildar, Dharapuram and the records connected with the proceedings dated 11th November, 1955, made in R. Dis. No. 25164/55-A-3 on the file of the Collector, Coimbatore, respectively and quash the orders therein.

S. Mohan Kumaramangalam and *D. Ramamurthi*, for Petitioner in both.

P. S. Kailasam and *N. Natarajan*, for 1st Respondent.

The Additional Government Pleader (*M. M. Ismail*) on behalf of Respondents 2 to 4.

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*W.P. Nos. 147 and 148 of 1958.

4th December, 1959.
(23rd day of Agrahayana, 1881—Saka).

The Court made the following

ORDER.—The question arising in these petitions is whether a woman is disqualified for being appointed as the headman of a village under the Madras Hereditary Village Offices Act, 1895, by reason of her sex.

One Deivasikamani Gounder was the village headman of Chitravuthampalayam in Dharapuram taluk in Coimbatore district. The office which he held was a hereditary one governed by the provisions of Madras Act III of 1895. He died in May, 1953, leaving no male issue but only four daughters. The petitioner is the eldest of these daughters. After the death of the petitioner's father was notified to the authorities, the name of the petitioner who was a minor on that date was registered on 17th July, 1954, in accordance with the provisions of section 10 (5) of the Act by the Revenue Divisional Officer, and one Udaya Gounder was appointed as the deputy to do the duties of the office pending the minor attaining majority. By an order, however, of the Collector, dated 11th November, 1955, passed without notice to the petitioner's guardian, the registration of the petitioner under section 10 (5) was cancelled for the reasons thus stated,

" There is no provision for registering the lavanam office in the names of female heirs."

By the same order the Revenue Divisional Officer was directed to deal with the matter, *de novo* and this officer registered by order, dated 23rd February, 1956, one Udayappan a brother's son of Deivasigamani Gounder as the minor office-holder, the deputy Udaya Gounder however being continued.

The petitioner who had by then attained majority came to know in November, 1957, of the cancellation of the registration of her name and the appointment of Udayappan, her cousin, in her place and she thereupon filed an application to the Collector to review and set aside his previous order. This was rejected by him in his order, dated 12th December, 1957. The reason for the dismissal of this application was stated to be that

"there was no provision for the registration of a female as hereditary village officer under Madras Act III of 1895 ".

Thereafter the petitioner filed W.P. No. 147 of 1958 for the issue of a writ of *certiorari* to quash the order of the Tahsildar, dated 23rd December, 1956, appointing the petitioner's cousin Udayappan as the next in succession to her deceased father, and W.P. No. 148 of 1958 against the order of the Collector, dated 11th November, 1955, cancelling her registration as the next in succession.

The point arising in these petitions is, therefore, whether a woman is disqualified by reason of her sex from being appointed to the office under the Madras Hereditary Village Offices Act. Section 10 of the Act is the relevant provision dealing with the rules to be observed in making appointments, on vacancies arising. As originally enacted section 10 read,—

When a vacancy occurs in any of the village offices forming class (1) in section 3, the Collector shall fill up the vacancy in accordance with the provisions of the following sub-sections :

(1) No person shall be eligible for appointment........(ii) to any of the offices forming class (1) in section 3, if such person (*a*) is not of male sex.

Sub-clauses (*b*) to (*f*) refer to other qualifications or disqualifications which are not relevant. Section 10 (2) of the Act read,

" The succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India ".

The other provisions of this section are not of immediate relevance.

Article 16 (2) of the Constitution enacts,

" No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State ".

Clauses (3) to (5) of the Article enact exceptions to the rules contained in Article 16 (2) but they do not touch the discrimination based upon sex or in any way qualify that provision. After the Constitution came into force, laws in force in India were adapted. Article 372 (2) of the Constitution provided:

"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment as may be necessary or expedient and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

By virtue of the power thus conferred the Adaptation of Laws Order, 1950, was promulgated and under it the provision in section 10 (1) (ii) (*a*) containing the disqualification because a person was not of the male sex was deleted. The question, therefore, is whether in the face of the provision in the Constitution, Article 16 (2), coupled with the amendment effected by the Adaptation of Laws Order, 1950, it would be possible to hold that women are since 1950 disqualified from holding public offices dealt with by Madras Act III of 1895.

Having considered the matter with care I am clearly of the opinion that there is and can be no such disqualification. In the orders now impugned the words used are " there is no provision for registering the lavanam office in the names of female heirs ". Undoubtedly there is no specific provision declaring the competency of female heirs to succeed to village offices, in the sense that they are specifically mentioned. But the question is whether when section 10 (1), speaks of " a person " being eligible for appointment and when section 10 (2) speaks of "the heir" they should be held to exclude " persons of the female sex " and " female heirs " respectively. When section 10 (1) (ii) (*a*) was part of the enactment—before the Adaptation of Laws Amendment Order, 1950 "persons of the female sex " were specifically excluded, presumably because in the absence of such a prohibition, the next "heir" under section 10 (2) would include "female heir" and the expression "person" in the opening words of section 10 (1) would include a " person of the female sex ".

The learned Additional Government Pleader informed me that the Government took the view that female heirs were excluded because of two reasons. The first was that in a judgment rendered by me in W.P. No. 273 of 1957, I had observed, "The Statute (Act III of 1895) does not contemplate the appointment of females to the hereditary village offices ". I have examined this judgment of mine and I am now satisfied that these observations which were by way of obiter are incorrect. On that occasion the existence of a disqualification against females enacted by section 10 (1) (ii) (a) and the amendment brought about by the deletion of this provision by the Adaptation of Laws Order, 1950, was not brought to my notice ; nor did I bear in mind the provision in Article 16 (2) of the Constitution.

The second reason mentioned by the learned Additional Government Pleader was that the provision in section 10 (2) regarding " devolution on a single heir according to the rule of primogeniture " might itself be sufficient to effect exclusion, of female heirs. The submission, however, is not well founded. As observed in *Anant* v. *Shanker*[1].

" It (an impartible estate) may devolve as joint family property or as separate property of the last male owner. In the former case it goes by survivorship to that individual among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, *e.g.*, lineal male primogeniture. In the latter case jointness and survivorship are not as such in point ; the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom ".

As laid down by the *Sivaganga Case*[2], (which was itself the case of a female succeeding to an impartible estate) and as explained by Sir Richard Couch in *Raja Jogendra Bhupati Hurri Mahapatra* v. *Nityanund Mansingh*[3], the fact of the Raj being impartible does not affect the rule of succession.

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1. (1943) 2 M.L.J. 599 : L.R. 70 Ind. App. 232 (P.C.).
2. (1863) 9 M.I.A. 539.
3. (1890) L.R. 17 Ind. App. 128 : I.L.R. 18 Cal. 151 (P.C.).

If the office of the village headman should be conceived of as the joint property of the holder and his undivided coparceners, succession would devolve by survivorship. If on the other hand the office were conceived of as the separate property of the office holder, the devolution would follow the rule relating to partible property modified by the special custom by which it is vested in a single heir. In *Subramania Pandia* v. *Siva Subramania*[1], Muttuswami Iyer and Best, JJ., laid down the law in the following terms; which has received the approval of the Privy Council in *Parbati Kunwar* v. *Chandrapal Kunwar*[2]. The learned Judges said dealing with the principles applicable to succession to impartible property :

"The first of them is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. . . . . . . In determining who the single heir is according to these principles, we have first to ascertain the class of heirs who would be entitled to succeed to the property, if it were partible, regard being had to its nature as coparcenary or separate property, and we have next to select the single heir by applying the special rule indicated above".

So far as village offices are concerned it must now be taken as settled law that they should be dealt with, in so far as it partakes of the character of property, as the separate property of the office holder, by virtue of the principle laid down in the decision of the Privy Council in *Venkata Jagannatha* v. *Veerabhadrayya*[3]. If the succession has to be traced on the basis that it is the separate property of the last holder, a daughter would certainly not be excluded, and applying the rule as to the single heir and primogeniture, the eldest of the daughters would certainly be the heir who would have succeeded to the office if it were of the nature of impartible property which was the separate property of the last holder.

In my judgment, therefore, section 10 (2) far from negativing the claim of the petitioner, would appear to support it. There is no exclusion of female heirs under the Mitakshra Law for succeeding to separate property of the last owner even if such property were an impartible estate, and if that rule applied, the petitioner would be within the class of heirs entitled to succeed.

In my judgment the petitioner is entitled to the reliefs which she seeks in these petitions. The petitions succeed and the rules *nisi* are made absolute and the orders impugned are set aside. There will be no order as to costs.

P.R.N. — *Orders set aside—Rule made absolute.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

G. Kandaswami Naicker .. *Appellant**

v.

G. Raju Naicker and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 11—Procedure where pauper fails—Plaint with deficit Court-fee—Plaintiff not allowed to continue suit in forma pauperis—*Subsequent dispaupering—Withdrawal of the proceedings—Applicability of rule 11.*

The plaint for partition was presented with a fixed Court-fee but the office returned the plaint directing the plaintiff to value the relief to set aside a mortgage decree mentioned in the plaint and to pay Court-fee on such valuation. Thereupon the plaintiff filed an application to continue the suit *in forma pauperis* which was refused by the Master but which was allowed by the Judge in Chambers.

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1. (1894) 4 M.L.J. 152: I.L.R. 17 Mad. 316.
2. (1909) 19 M.L.J. 605: L.R. 36 Ind. App. 125.
3. (1921) 41 M.L.J. 1 : I.L.R. 44 Mad. 643 : L.R. 48 Ind. App. 244 (P.C.).

* O.S.A. No. 3 of 1957. 3rd December, 1959. (12th Agrahayana, 1881—Saka).

An O.S. Appeal against this was preferred by one of the defendants. Meanwhile the Government on information about the means of the plaintiff filed an application for dispaupering him. When the O.S. Appeal came up for hearing before it the Bench directed the Master to submit a finding on the question of pauperism of the plaintiff after taking additional evidence. The Master passed an order dispaupering the plaintiff. The O.S. Appeal was allowed, and the order of the single Judge was set aside. Then the plaintiff purported to withdraw the suit. On a question whether the plaintiff was liable to pay full Court-fee under Order 33, rule 11, Civil Procedure Code.

Held: The legal result of the appellate order in the O.S. Appeal was as if the plaintiff had never been allowed to continue the suit *in forma pauperis*. It follows that there was never a suit properly on the file of this Court either *in forma pauperis* or on payment of the requisite court-fee. There was no suit for the plaintiff to withdraw.

Once the plaintiff was not allowed to continue the suit *in forma pauperis* and he had not paid the requisite court-fee the suit must be deemed to be not on the file and if the plaintiff did not choose to pay the deficit Court-fee what this Court can do is to return the papers to him. In such circumstances the provisions of Order 33, rule 11 of the Code will have no application and the plaintiff could not be directed to pay any further Court-fee under that provision.

Appeal against the Judgment and Order of the Honourable Mr. Justice Balakrishna Ayyar, dated 27th July, 1956 and passed in the exercise of the Ordinary Civil Jurisdiction of the High Court in C.S. No. 74 of 1954.

F. S. Vaz and *N. Ranga Reddy*, for Appellants.

The Government Pleader (*K. Veeraswami*) for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Balakrishna Ayyar, J., directing the appellant to pay a sum of Rs. 615-1-0 towards the Court-fee due on a plaint which he presented on the Original Side of this Court. The suit was for partition. In the plaint there were averments regarding a mortgage decree and a sale which followed that decree and the plaintiff apparently contended that the decree and the sale were not binding on him. The plaint was presented on 28th May, 1952, with a Court-fee of Rs. 100, evidently on the assumption that it fell under Article 17-B, Schedule II of the Court-fees Act. On 12th August, 1952, the office returned the plaint directing the plaintiff to value the relief to set aside the mortgage decree and to pay Court-fee thereon on such valuation. Thereupon the appellant filed an application for leave to continue the suit *in forma pauperis*. On 23rd September, 1953, the learned Master passed an order refusing leave to the plaintiff to continue the suit as pauper but allowed him six weeks time to pay deficit Court-fee. Against this order of the Master an appeal was taken to the learned Judge in Chambers. Ramaswami, J., by his order dated 29th January, 1954, disagreeing with the Master allowed the plaintiff to continue the suit as a pauper. In pursuance of this order the plaint was registered and numbered as O.S. No. 74 of 1954 on the 24th February, 1954. Against the order of Ramaswami, J., one of the defendants preferred an appeal O.S. Appeal No. 59 of 1954. Meanwhile the Government on information that the appellant was possessed of properties which had not been disclosed in his original pauper petition filed an application on 8th December, 1954, for dispaupering the appellant. When the appeal against the order of Ramaswami, J., came up before the Appellate Bench they made an order on 15th April, 1955, directing the Master to submit a finding on the question of the pauperism of the appellant after taking additional evidence. As the subject-matter was the same, the Master passed a general order on 17th October, 1955, to this effect:

"It follows that the order in Application No. 5675 of 1954 is that the plaintiff is dispaupered and that he shall pay the Court-fee within six weeks from today. This order shall however await further orders in O.S. Appeal No. 59 of 1954".

On 2nd February, 1956, O.S. Appeal No. 59 of 1954 was allowed and the order of Ramaswami, J., was set aside. This meant that the appellant must be deemed to have not been permitted at any time to continue the suit *in forma pauperis*. On 16th February, 1956, the appellant purported to withdraw the suit and it was dismissed. It was then contended on behalf of the Government that the appellant was liable to pay full Court-fee under Order 33, rule 11 of the Code of Civil Procedure. A further fact may be mentioned. On 22nd November, 1955, that is, after the order of the

learned Master dispaupering him and before the disposal of the appeal by the Division Bench, the appellant paid a sum of Rs. 937-6-0 as additional Court-fee, but according to the office, this was not adequate and the appellant had to pay further Court-fee. Balakrishna Ayyar, J., held that the appellant had been allowed to sue as a pauper and subsequently he had been dispaupered and therefore the provisions of Order 33, rule 11 of the Code of Civil Procedure would apply and made the order now under appeal.

With respect to the learned Judge, we are unable to agree with this view. In more than one place the learned Judge has said that the appellant had been permitted to sue *in forma pauperis* obviously referring to the order of Ramaswami, J., passed on 29th January, 1954. But the order of Ramaswami, J., was in terms set side by the Division Bench which disposed of O.S. Appeal No. 59 of 1954 and the order of the Master was restored. The legal result of the order of the appellate Court would therefore be as if the appellant had never been allowed to continue the suit *in forma pauperis*. The learned Judge observed that the decision of the Bench in O.S. Appeal No. 59 of 1954 merely confirmed the order of the Master by which the appellant was dispaupered. That is not so. On a proper construction of the order of the appellate Court, we hold that the order of Ramaswami, J., allowing the appellant to continue the suit *in forma pauperis* was set aside. Once it is held that the appellant was never allowed to continue the suit *in forma pauperis* and it is also the case of the Government that he had never paid the requisite Court-fee, it follows that there was never a suit properly on the file of this Court either *in forma pauperis* or on payment of the requisite Court-fee. Owing to the fact that the suit was numbered on account of the order of Ramaswami, J., the appellant purported to withdraw the suit. But this would not be the correct position in law. There was no suit for him to withdraw. What the plaintiff must be deemed to have done is to stop further prosecution of his claim. Once he was not allowed to continue the suit *in forma pauperis* and he had not paid the requisite Court-fee, the suit must be deemed to be not on the file, and if the plaintiff did not choose to pay the deficit Court-fee, what this Court can do is to return the papers to him. In such circumstances we are of opinion that the provisions of Order 33, rule 11 of the Code of Civil Procedure will have no application. The appellant could not be directed to pay any further Court-fee under that provision. The appeal is allowed and the order of Balakrishna Ayyar, J., requiring the appellant to pay a further amount of Rs. 615-1-0 as deficit Court-fee is set aside. There will be no order as to costs.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE BALAKRISHNA IYER.

The Management of Sri Ranga Vilas Ginning, Spinning and Weaving Mills Ltd., Coimbatore .. *Petitioners**

v.

The Industrial Tribunal, Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33 (2)—Jurisdiction of Tribunal under—Scope and extent of.

In disposing of an application under section 33 (2) of the Industrial Disputes Act for permission to dismiss an employee during the pendency of the adjudication of a dispute, the tribunal has only to consider whether there was a *prima facie* case for dismissal of the workman or whether the management was actuated by improper motives or whether there was any unfair labour practice or victimisation involved in the action proposed to be taken. If there are no *mala fides* or unfair labour practice or victimisation involved the tribunal is bound to give the permission asked for provided a *prima facie* case was made out for the proposed dismissal. It is not for the Tribunal to satisfy itself whether the charges framed against the employee has been proved.

Atherton West and Co. v. S. M. Mazdoor Union, (1953) S.C.J. 333 : (1953) S.C.R. 780 : A.I.R. 1953 S.C. 241; *L. D. Sugar Mills v. Ram Sarup*, (1957) S.C.J. 471 (1956) S.C.R. 916 : A.I.R. 1957 S.C. 82 and *Martin Burn Ltd. v. R. N. Banerjee*, 1958 S.C.J. 255: 1958 M.L.J. (Crl.) 208 : A.I.R. 1958 S.C. 79, referred to.

*W.P. No. 1019 of 1958. 7th July, 1959.
(16th Asadha—Saka, 1881.)

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Petition No. 28 of 1958 in I.D. No. 13 of 1958, dated 11th July, 1958, on the file of the Industrial Tribunal, Madras and quash the order made therein.

V. Tyagaraja Iyer, for *Messrs. M. A. Narayanaswami* and *N. Kannan*, for Petitioner.

K. V. Sankaran, for Respondents.

The Court made the following

ORDER.—On 31st March, 1958, Mariappan, a maistry employed by the Sree Ranga Vilas Ginning, Spinning and Weaving Mills reported to the manager that about 4-20 P.M., that day he asked one Chellappan why there was so much "breakage in the machine" and that thereupon he was abused, beaten and kicked by some seven employees of the Mills whom he named in his report. Immediately afterwards the management issued a notice suspending these employees with effect from 8-30 P.M. until further orders. On 1st April, 1958, the management issued a notice to all these seven employees requiring them to show cause why disciplinary action should not be taken against them. They were further informed that they should submit their explanation in writing within 24 hours of the receipt of the notice and that in default it would be assumed that they had no explanation and appropriate action taken. On 2nd April, 1958, these employees wrote back denying the charges and praying that the order of suspension passed against them be vacated. On 4th April, 1958, the management wrote to these seven employees that an enquiry would be held into their conduct at 10 A.M. the following day. To that the employees replied requesting that one Narayanaswami employed in the weaving department and another Chenniappan employed in the spinning department of the Mills should be permitted to act as their representatives at the enquiry to be held on 5th April, 1958. The permission asked for was granted. The enquiry commenced on 7th April, 1958 and it was concluded on 22nd April, 1958. The record of the enquiry maintained by the management shows that at the conclusion of the proceedings the enquiring officer informed those persons that orders would be passed in the course of a week. Below that the signatures of the representatives of the concerned workers appear. After the proceedings were closed the workmen concerned wrote to the Manager of the mills in these terms:

> "Pursuant to our suspension until further orders, at the commencement of the enquiry, we were asked to submit the list of our witnesses. At that time we replied that we would give the list of our witnesses after the witnesses for Mariappan were examined.
>
> Accordingly after the witnesses for Mariappan were examined, we were examined individually without any order. After examination of all the seven of us, we told that our witnesses should also be examined. The Assistant Manager to the Enquiry Officer, stated "We would not examine your witnesses."
>
> We strongly protest against this, because opportunity is denied to us to prove that the charges framed against us are not true.
>
> Hence, we request you once again, to examine our witnesses also".

On 26th April, 1958, the management replied pointing out that at the commencement of the enquiry the workers had been called upon to submit their list of witnesses and that they had then stated that they would furnish the list after the completion of the examination of the witnesses for Mariappan the complainant. The letter also pointed out that during the enquiry held on the 21st and the 22nd of April, each of them was asked individually whether he had anything further to say and that each of them had stated that he had nothing to say. It was also pointed out that it was only thereafter that it was noted that the enquiry was concluded and that the decision would be given within a week. The letter concluded :

> "Your present petition cannot be accepted as you have not examined your witnesses at the opportunity given to you already and after you consented to the enquiry being concluded and adjourned for decision, and as it is an afterthought".

On 30th April, 1958, the employees in question replied as follows :—

"You told that you would examine our witnesses after the examination of the witnesses of Maistry Mariappan, in connection with the charges levelled against us. But as you have refused to examine our witnesses, the enquiry against us is not valid. Your decision will not bind us. We humbly request you to examine our witnesses."

On 2nd May, 1958, the management passed orders holding the charges proved and directing the dismissal of the workmen with effect from 31st March, 1958. Now at that time a dispute regarding bonus was pending before the Industrial Tribunal, Madras, and in view of that the management applied under section 33 (2) of the Industrial Disputes Act to the Industrial Tribunal for its approval of the action taken. The Tribunal observed:

"It will be seen from that record that the enquiry officer did not put any question to these workers whether they had any witnesses to be examined. On the other hand, as stated above, without ascertaining that fact, the enquiry officer announced his decision to close the enquiry and posted the matter for pronouncing orders. . . . . . On these letters, it is clear that these workers wanted to examine witnesses in support of their defence. . . . . . In other words, no opportunity was given to the workers to examine their witnesses. . . . . . Even apart from that, very soon after the enquiry was formally closed by the enquiry officer, the workers prepared the petition, Exhibit W-1, addressed to the Manager, and presented it to the enquiry officer that they might be given an opportunity to examine their witnesses. At least on that petition it was clearly the duty of the management to have directed the examination of the witnesses proposed to be examined by the workers. . . Not only that, I even consider that there is truth in what they stated, namely, that even before the closure of the enquiry they made a request to the enquiry officer that their witnesses should be examined and that he refused to do so. In these circumstances, I am not in the least satisfied with the way in which the enquiry was closed by the management. It was certainly unfair because the workers were not given an opportunity to examine their witnesses . . . . . . It follows that the approval prayed for cannot be granted."

In this view the petition filed by the management was dismissed. The present petition has been filed by the management for the issue of an appropriate writ to quash this order of the Industrial Tribunal.

In paragraph 20 of the affidavit filed in support of the petition it is stated that on 20th September, 1958, the management wrote to the employees concerned informing them that they were at liberty to bring and examine their witnesses and that for that purpose the enquiry was posted to 30th September, 1958. By a letter dated 24th September, 1958, the employees in question:

" flatly refused to have anything to do with any such enquiry and demand reinstatement . . . . Though the Management were of the view that the workers had adequate opportunity to examine their witnesses, but they did not utilise the same, yet out of defence to the observations of the Tribunal, that the workers had no such opportunity, the Management were willing to give them such an opportunity. The workers, instead of availing themselves of that opportunity and examine their witnesses, if any, had, on erroneous reasoning, refused to attend the enquiry. Obviously, they have no witnesses in support of their case, as otherwise, they would have taken advantage of the offer of the Management in their letter dated 30th September, 1958. I am stating this only to emphasise my earlier statement that the request in the letter addressed by the workers after the conclusion of the enquiry complaining about want of opportunity to examine their witnesses is a pure afterthought and not a genuine one."

Vide paragraph 20 of the affidavit filed in support of the petition.

The first contention of Mr. Tyagarajan, the learned advocate for the petitioner, was that the Industrial Tribunal was in error in taking the view that the management had not given the employees concerned a reasonable opportunity to examine defence witnesses. He referred to the fact that even at the commencement of the enquiry the management had asked the workers concerned to submit their list of witnesses and that they had then stated that they would submit the list after the witnesses on behalf of Mariappan had been examined. But they did not do so. He emphasised the fact that on the 21st and the 22nd of April the Workers concerned were questioned individually when they were asked whether they had anything further to say. At that time all that they stated was 'nothing'. If they desired any witness to be examined on their behalf it was open to them to have said so at that time. After the conclusion of the enquiry the enquiring officer intimated that orders would be pronounced within a week. Even at that stage no request was made for the examination of the defence witnesses. If such a request had been made and it had been refused the representatives of the workers would not have signed below the record without entering their protest. When the matter was before the Industrial Tribunal the workers

concerned did not say that they had this or that witness to be examined as they could have easily done if their complaint that their defence witnesses were not examined were a genuine and *bona fide* one. After the Tribunal disposed of the matter and in defence to the observations it had made the management wrote to the workers concerned that they might bring and examine their witnesses and for that purpose the enquiry was posted to 30th September, 1958. But the workmen concerned did not choose to participate in that enquiry. In the circumstances the letter which the workmen addressed to the Manager on 22nd April, 1958, after the conclusion of the enquiry can only be regarded as an ingenious afterthought. When the proceedings closed they must have been in a position to anticipate what the decision was likely to be and the letter in question was only a clever attempt to lay some sort of a foundation for further contentions. I agree that there is considerable force in these criticisms of Mr. Tyagarajan. I am also inclined to consider that the Tribunal attached much more importance to the letter which the employees sent on 22nd April, 1958, after the conclusion of the enquiry than it deserves. Nonetheless the finding of the Tribunal that no opportunity was given to the workers to examine their witnesses is a finding of fact and I doubt whether in a writ proceeding of this kind I shall be justified in going behind that finding. I must, therefore, proceed on the basis that this finding is correct and it stands.

Mr. Tyagarajan next contended that even so the Tribunal exceeded its jurisdiction. The extent and scope of the jurisdiction of the Tribunal in matters of this kind has been considered by the Supreme Court on at least three different occasions. The first of the cases is *Atherton West & Co.* v. *S. M. Mazdoor Union*[1]. The decision there was given under the U.P. Industrial Disputes Act of 1947 and a notification issued by the Government, the relevant portion of which ran as follows :—

"Save with the written permission of the Regional Conciliation Officer or the Assistant Regional Conciliation Officer concerned irrespective of the fact whether an enquiry is pending before a Regional Conciliation Board or the Provincial Conciliation Board or an appeal has been filed before the Industrial Court, no employer, his agent or manager, shall discharge or dismiss any workmen during the continuance of an enquiry or appeal and pending the issue of the orders of the State Government upon the findings of the said Court."

Explaining the scope of the powers of the Regional Conciliation Officer and the Assistant Regional Conciliation Officer the Supreme Court observed :

"The Regional Conciliation Officer or the Assistant Regional Conciliation Officer concerned would institute an enquiry and come to the conclusion whether there was a *prima facie* case made out for the dismissal of the workmen and the employer, his agent or manager was not actuated by any improper motives or did not resort to any unfair practice or victimisation in the matter of the proposed discharge or dismissal of the workman. But he was not entrusted, as the Board or the Industrial Court would be, with the duty of coming to the conclusion whether the discharge or dismissal of the workman during the pendency of the proceedings was within the rights of the employer, his agent or manager."

The Regional Conciliation Officer had only to consider whether there was a *prima facie* case for the dismissal of the workman, or whether the management was actuated by improper motives, or whether the management resorted to any unfair labour practices or whether the workmen were being victimised and there his jurisdiction stopped. The matter was even more fully explained in the decision in *L. D. Sugar Mills* v. *Ram Sarup*[2]. Paragraph 19 of the Judgment runs as follows :

"The scope of the enquiry before the Labour Appellate Tribunal under section 22 of the Act has been the subject-matter of decisions by this Court in *Atherton West & Co., Ltd.* v. *S. M. Mazdoor Union*[1] and *Automobile Products of India, Ltd.* v. *Rukmaji Bala*[3]. The Tribunal before whom an application is made under that section has not to adjudicate upon any industrial dispute arising between the employer and the workman but has only got to consider whether the ban which is imposed on the employer in the matter of altering the conditions of employment to the prejudice of the workman or his discharge or punishment whether by dismissal or otherwise during the pendency of the proceedings therein referred to should be lifted. A *prima facie* case has to be made out by the employer for the lifting of such ban and the only jurisdiction which the Tribunal has is either to give such permission

1. (1953) S.C.R. 780: (1953) S.C.J. 333 : A.I.R. 1953 S.C. 241.
2. (1957) S.C.J. 47 : (1956) S.C.R. 916 : A.I.R. 1957 S.C. 82.
3. (1955) S.C.J. 253: (1955) 1 S.C.R. 1241 : (1955) 1 M.L.J. (S.C.) 148 : A.I.R. 1955 S.C. 258 (1).

or to refuse it provided the employer is not acting *mala fide* or is not resorting to any unfair practice or victimization. . . . . On such action being taken by the employer the workman would be entitled to raise an industrial dispute which would have to be referred to the appropriate Tribunal for adjudication by the Government on proper steps being taken in that behalf. When such industrial dispute comes to be adjudicated upon by the appropriate Tribunal, the workman would be entitled to have all the circumstances of the case scrutinised by the Tribunal and would be entitled to get the appropriate relief at the hands of the Tribunal."

If no unfair labour practice is involved, if there is no victimisation and if there are no *mala fides*, the Tribunal is bound to give the permission asked for provided a *prima facie* case was made out.

The subject was further explained in the decision in *Martin Burn Ltd.* v. *R. N. Banerjee*[1]. In paragraph 27 their Lordships said :

"The Labour Appellate Tribunal had to determine on these materials whether a *prima facie* case had been made out by the appellant for the termination of the respondent's service. A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on that evidence on the record. (See *Buckingham and Carnatic Co., Ltd.* v. *The Workers of the Company*[2].)

Judged by the rules laid down by the Supreme Court the Tribunal, said Mr. Tyagarajan, was acting in excess of its jurisdiction. Instead of considering whether a *prima facie* case had been made out it went on to examine the procedural infirmities in the enquiry conducted by the management as though it had been a Court of Criminal appeal.

On the other side Mr. Sankaran contended that the Tribunal has found that the witnesses for the defence were not examined that in consequence it follows that there had been a departure from the principles of nature justice and that when the Tribunal is satisfied that there has been such a departure it is justified in refusing to approve the action proposed. The contention of Mr. Sankaran if accepted would necessitate an enlargement of the scope of the decisions of the Supreme Court. It must be realised that there is a distinction between saying that a *prima facie* case exists and that an offence has been proved. This distinction is a familar and important feature of our Criminal Procedure Code. A committing Magistrate for example has not to consider whether the accused before him is guilty or not but only whether a *prima facie* case exists that would justify his being committed to Sessions. It is for the Sessions Court to decide whether the accused is guilty or not. The argument of Mr. Sankaran requires not merely that the Industrial Tribunal should be satisfied that there is a *prima facie* case against the workmen concerned but that it should also be satisfied that these workmen are guilty of the charges framed against them. But this is not what the Supreme Court said. The language used by the Supreme Court in every one of these decisions is a *prima facie* case, which is very different from saying that the offence has been proved. Though it would not be proper to say that a person is guilty of an offence without examining his defence witnesses it will be perfectly in accordance with our Criminal Procedure Code to say that a *prima facie* case exists against such a person without examining his defence witnesses.

It may be asked what then is to happen if the management holds a very perfunctory enquiry or an enquiry which is opposed to the principles of natural justice and then proceeds to dismiss an employee. The answer to this is to be found in the second of the three decisions of the Supreme Court which I have cited and it is that it will be open to the employees to raise an industrial dispute. When that is done the entire matter including procedural infirmities can be canvassed. The circumstance that at the request of the management the Industrial Tribunal has given its approval would not preclude and industrial dispute being raised and the entire question being investigated. It will be appreciated that it would involve a redundancy to insist that

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1. (1958) S.C.J. 255 : (1958) M.L.J. (Crl.) 208 : A.I.R. 1958 S.C. 79.
2. (1952) Lab. A.C. 490 (*f*).

the Industrial Tribunal should have jurisdiction to enquire into the propriety of the manner in which the enquiry was held and at the same time to say that after it has given its approval the same questions can be agitated again by raising an industrial dispute. The circumstance that permission or approval applied for has been given by the Industrial Tribunal does not in any way enlarge or reduce the rights of the workmen concerned to call in question the order of the management. As I said before the decisions of the Supreme Court only require that the Management should satisfy the Industrial Court or Tribunal concerned that a *prima facie* case exists against the workmen, that it is not acting *mala fide* or resorting to victimisation or unfair labour practice. To accept the argument of Mr. Sankaran would amount to adding to the categories enumerated by the Supreme Court, not once or twice but thrice and I do not think I shall be justified in doing that. I accept the contention of Mr. Tyagarajan that in making the order complained of the Industrial Tribunal ordered in excess of its jurisdiction.

In the result this petition is allowed and the order complained of is quashed. There will be no order as to eosts.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE GANAPATIA PILLAI.

P. Natesa Nattar .. *Appellant**

v.

J. G. Daniel (died) and others .. *Respondents.*

Adverse possession —Simple mortgage—Third party trespasser can prescribe title against the mortgagor—Mortgagees' rights cannot be affected.

Limitation Act (*IX of* 1908), *Article* 142—*Suit in ejectment —Plaintiff must prove title and possession within* 12 *years.*

The mortgagor is entitled to the equity of redemption and if the mortgage is a simple mortgage is entitled to be in possession. There is no reason why a third party should not oust him from possession and by continued possession over the statutory period of twelve years extinguish the mortgagor's right to be in possession. Once such a right is extinguished the result would be that the third party-trespasser would acquire the equity of redemption. Of course this result would not however affect adversely the rights of the mortgagee.

In a suit for ejectment the plaintiff cannot rest his claim on title alone but must also show that he has exercised rights of ownership by being in possession within twelve years of suit.

Appeal under Clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Basheer Ahmed Sayeed, dated 10th December, 1954 and passed in C.C.C. A. No. 145 of 1951 preferred against the decree of the City Civil Court at Madras, in O.S. No. 371 of 1949.

A. Narasimhachariar and *A. N. Rajagopalan*, for Appellant.

N. S. Raghavan, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal against the judgment of Basheer Ahmed Sayeed, J., arises out of a suit filed in the City Civil Court at Madras by the respondent, J.G. Daniel, for possession of a house. The suit house belonged originally to one Kuppuswami Nattar who executed a mortgage over the property in 1926 to secure a sum of Rs. 1,000 borrowed by him from one Angammal. Angammal assigned the mortgage in her favour to one Rajagopala Naidu who in turn assigned it to one Kuppuswami Naidu. Kuppuswami Naidu filed a suit on the mortgage against the minor son of Kuppuswami Nattar who had died and obtained a decree for sale. The final

* (Pauper) L.P.A. No. 74 of 1955. 8th September, 1959.
(17th Bhadra, 1881—Saka.)

decree was assigned to the plaintiff in 1943 and he was brought on record as the transferee decree-holder. He thereafter applied for sale of the house and purchased the house himself in Court-auction after obtaining leave to bid. After obtaining sale certificate when the plaintiff attempted to take possession of the suit property the defendant obstructed, urging that he was in possession in his own right. Hence the appellant was compelled to file a suit. Several defences were raised by the defendant which it is not necessary to mention for the purpose of disposal of this appeal. *Inter alia* he contended that the suit was barred by limitation as the plaintiff and his predecessors in title were never in possession of the suit property within twelve years prior to the suit. He also set up a case of adverse possession alleging that he and his father Ponnappa before him had been in possession and management of the property even prior to 1926. Two issues were raised so far as limitation was concerned, namely,

Issue 2.—Is the suit barred by limitation, and has the defendant obtained title to the suit property by adverse possession and prescription ?

Issue 3.—Has the plaintiff and his predecessors been in possession of the suit property within 12 years of suit ?

The learned Judge of the City Civil Court who tried the suit found in favour of the defendant on *Issue* 2, namely, that the defendant had obtained title to the suit property by adverse possession and on *Issue* 3 he found that the plaintiff and his predecessors in title had not been in possession of the suit property within twelve years of suit. In view of these findings the suit was dismissed. The plaintiff appealed to this Court (C.C.C.A. No. 145 of 1951). The appeal was heard and disposed of by Basheer Ahmed Sayeed, J. He allowed the appeal and set aside the decree of the learned City Civil Judge and passed a decree in favour of the plaintiff. He found that the original mortgage in favour of Angammal was a simple mortgage, and the defendant and his predecessors even if they had been in possession of the mortgage property, such possession would not be adverse either to the mortgagor or to the mortgagee and that it was not therefore necessary for the plaintiff to prove that he and his predecessors were in possession of the property in suit within twelve years. The learned Judge therefore did not give any specific finding on the two issues and particularly *Issue* 3, on the facts. His finding on *Issue* 2 was based on the assumption in law that the possession of the defendant could not be adverse to the mortgagor because the mortgage was a simple mortgage, and he thought it was unnecessary to go into the facts to give a finding on *Issue* 3 because it was not necessary in the circumstances for the plaintiff to prove that he and his predecessors in title were in possession within twelve years before the suit. With respect to the learned Judge we are constrained to say that he was in error in the legal assumptions on which his judgment is founded. It is no doubt well-established, vide *Vyapuri* v. *Sonamma Boi Ammani*[1], that adverse possession against a mortgagor would not affect the right of a simple mortgagee. This would be so even in an extreme case in which the rights of the mortgagor might become extinguished by adverse possession by a trespasser. Srinivasa Ayyangar, J., in *Vyapuri* v. *Sonamma Boi Ammani*[1], observed (at page 825) :

" I see no reason therefore for holding that the extinction of the mortgagor's title by the adverse possession of a third party operates to extinguish the mortgagee's right to enforce his charge, any more than easements over the property ".

There is no authority however for the position that once a simple mortgage is executed there could be no possession by a third party adverse to the rights of the mortgagor. On principle such a position is untenable. The mortgagor is entitled to the equity of redemption, and if the mortgage is a simple mortgage, is entitled to be in possession. There is no reason why a third party should not oust him from possession, and by continued possession over the statutory period of twelve years extinguish the mortgagor's right to be in possession. Once such right is extinguished the result would be that the third party-trespasser would acquire the equity of redemption. Of course, as already mentioned, this result would not however affect adversely the rights of the mortgagee.

1. (1915) 29 M.L.J. 645 : I.L.R. 39 Mad. 811 (F.B.).

The position therefore is this, that the learned Judge did not examine the facts and give his finding on both the material issues relating to limitation. But we do not think it is necessary to remand the case for fresh disposal. We shall assume for the purpose of this appeal that the defendant has not been able to establish adverse possession for over the statutory period. Nevertheless it will be incumbent on the plaintiff to prove that he and his predecessors in title have been in possession of the suit property within twelve years of suit. This is the rule of law laid down by the Full Bench of this Court in *Official Receiver, East Godavari* v. *Govinda Raju*[1]. It was there laid down that in suits for ejectment where the plaintiff sues for possession of immovable property in the occupation of another, the plaintiff cannot rest his case on title alone. Article 142 of the Limitation Act applies to such suits and the plaintiff must show that he has exercised rights of ownership by being in possession within twelve years of suit. There too the plaintiff was a purchaser at a Court-auction held in execution of a mortgage decree which was obtained in a suit brought on a simple mortgage. Now it cannot be denied, and learned counsel for the plaintiff-respondent frankly admitted that there is no evidence in this case that the plaintiff and his predecessors in title were in possession of the property within twelve years before suit. The only oral evidence adduced is that of the plaintiff himself and obviously he does not know anything about the position before his purchase. The documentary evidence does not assist the plaintiff in proving that he and his predecessors in title were in possession at any time within a period of twelve years prior to suit. It is therefore unnecessary to remand the case for fresh disposal. The plaintiff's suit must be held to be barred by Article 142 of Schedule 1 of the Limitation Act. The appeal is allowed and the plaintiff's suit is dismissed. As the plaintiff obviously has title in view of the fact that the mortgage was valid, we direct that each party should bear his own costs in all the Courts. As the appeal was filed *in forma pauperis*, the appellant will pay the Government the Court-fee payable on the memorandum of appeal.

V. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

Ramaswami Iyer .. *Appellant**

v.

Thandavam Pillai (died) and others .. *Respondents.*

Madras Hereditary Village Offices Act (III of 1895), sections 13 and 21—Lands forming the emoluments of a hereditary office—Suit for recovery—Not maintainable in a Civil Court.

A suit for the recovery of the lands forming the emoluments of a hereditary office specified in the Madras Hereditary Village Offices Act is cognizable by the Revenue Court only.

The substance of the plaintiff's claim has to be looked into in deciding the question of jurisdiction and not the form of the pleading.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in O.S. No. 11 of 1954.

K. V. Srinivasa Ayyar, for Appellant.

O. K. Ramalingam, T. M. Ramaswami Ayyar, A. R. Krishnaswami and *K. S. Ramamurthi,* for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This pauper appeal is directed against the decree and judgment of the learned Subordinate Judge of Dindigul in O.S. No. 11 of 1954 which was also filed in the pauper form.

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1. I.L.R. (1940) Mad. 953 (F.B.).

* Pauper Appeal No. 600 of 1955. 29th September, 1959.

The plaintiff who is the karnam of Poolanandapuram village seeks in substance the recovery of the suit lands on the ground that they constitute the emoluments of the office of the karnam of Poolanandapuram. In order to take the suit out of the mischief of sections 13 and 21 of the Madras Hereditary Village Offices Act (III of 1895), the reliefs prayed for are a declaration that the order of the Board of Revenue passed in 1953 is illegal and that the plaintiff is entitled to recover possession of the suit properties through the revenue Courts or to direct the defendants (alienees) to hand over possession of the suit properties to the plaintiff.

The facts necessary for understanding the claim made by the plaintiff can be gathered from the order of the Distirct Colleetor of Madurai Sri N. S. Arunachalam, I.C.S., in R.S.A.No. 2 of 1952. The suit lands which are considerable in extent, were originally service inam lands attached to the karnam's office at Poolanandapuram and there is no dispute that the plaintiff is the hereditary karnam, his father and grandfather having held that office before him. During the investigation by the Inam Commissioner the lands which were in Poolanandapuram were confirmed to the plaintiff's ancestors at 5/8th of the assessment and Inam patta was granted, while in respect of the lands in Chinnamanur which appear to have been Sirkar waste lands granted to meet the insufficiency of the emoluments, they were resumed and fully assessed in the name of the plaintiff's ancestors. Because the lands were in the occupation of another contending claimant for the post, the Collector after the issue of patta placed plaintiff's ancestors in possession of the lands. The rival agitated the matter both in the criminal and civil Courts and the claim of the plaintiff's father for the lands was fully established. During these proceedings it was specifically mentioned that the " *Manibam* ' consisted of the land and not *Tirva* alone. Some years after. there was a civil litigation in the family of the plaintiff in whice the suit lands were claimed as partible. That litigation ended in *Gunniyan* v. *Kamakshi Ayyar*[1]. The two sets of properties in Poolanandapuram and Chinnamanur were considered specifically in that decision and this Court after holding that the properties in one case had been enfranchised and in the other case converted into ryotwari tenure by the action of the Inam Commissioner, proceeded to discuss the result of such enfranchisement. The effect of enfranchisement was declared as freeing the lands from the restrictions regarding alienation and placing them under the ordinary jurisdiction of Civil Courts. This Court further held that the lands after enfranchisement partook the character of joint family properties and enabled not only the person who was appointed to the office at such enfranchisement but also the members of his family to ask for partition of the same and a partition was accordingly ordered. After the partition, the properties went into the hands of various purchasers and the plaintiffs father launched an expedition to recover the same and has been pursuing the same for several years. He has met with varying success. The revenue Courts dismissed the suit. He then moved the civil Courts and the matter was compromised there. He then resigned his post and his son, the present plaintiff has recommenced the litigation.

During all the earlier stages of the litigation it has been uniformly found that the land in Poolanandapuram had been enfranchised and that the lands at Chinnamanur had been given on ryotwari patta. In fact the plaint in the suit filed by the plaintiff's father averred that the property had been enfranchised and the decisions of the Munsif's Court, Dindigul and this Court in *Ghnniyan* v. *Kamakshi Ayyar*,[1] in appeal were that the lands were enfranchised. The plaintiff's contention has been that the decision of this Court has been overruled in *Musti Venkata Jagannadha* v. *Musti Veerabhadrayya*[2]. But the difference in view between the two decisions relates exclusively to the nature of the property vested on enfranchisement, whether it enures to the individual holder of the office at the time of enfranchisement or to his family as such. About the legal incidence of enfranchisement, how it permits the holder to dispose of the land without the restrictions imposed by Regulation VI of 1831 and the compe-

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1. (1902) I.L.R. 26 Mad. 339. I.L.R. 44 Mad. 643 (P.C.).
2. (1921) 41 M.L.J. 1 : L.R. 48 I.A. 244 :

tency of the Civil Courts to decide on all such matters, there is unison between the two decisions. It is clear from these decisions that the office-holder gets the right of alienation in return for the payment of favourable assessment and if there is any dispute regarding the validity of the disposal of the lands of the office-holder, such disputes can only be adjudicated upon by the civil Courts and not by the revenue Courts.

In these circumstances the plaintiff filed an application before the Deputy Collector, Usilampatti, for recovery of the emoluments alleged to be attached to the karnam's office of Poolanandapuram village in the Periakulam taluk. This application under section 13 of the aforesaid Act was dismissed. There was an appeal and this was disposed of by Mr. N. S. Arunachalam, I.C.S., District Collector, Madurai. He held that there could be no recovery of the alleged emoluments, because there had been enfranchisement of the lands long long ago and that the lands which could be alienated by the office-holder after such enfranchisement could not be recovered as inalienable emoluments attached to the office of the karnam. Therefore, he dismissed the appeal. There was a further appeal to the Board of Revenue and which appeal also shared the same fate.

The plaintiff has thereupon filed the suit which has given rise to this appeal in the pauper form for the reliefs mentioned above. The learned Subordinate Judge came to the conclusion that when the suit is in substance and in essence for recovery of emoluments of a hereditary office falling within section 13 of the aforesaid Act, it is barred from being agitated in the civil Court by section 21 of the said Act. He therefore dismissed the suit. Hence this appeal by the defeated plaintiff.

Section 13 states :

" Any person may sue before the Collector for any of the Village-Offices specified in section 3 or for recovery of the emoluments of any such office ".

Section 21 states :

" No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office."

The learned advocate for the appellant Mr. K. V. Srinivasa Ayyar advanced a novel argument before us that section 21 would bar only a claim which was both for recovery of the emoluments of such office and that the claim for the emoluments of the office alone would not be barred.

We do not find the slightest difficulty in rejecting this contention which has only the merit of novelty, because it is opposed to a plain reading of the section reproduced above and secondly, the point is concluded by authority. This Court in a long series of decisions has held that a suit for recovery of the lands forming the emoluments of a hereditary office specified in the Act is cognizable by the revenue Court only; *Pichuvayyan* v. *Vilakudiyan*[1], *R.G. Orr.* v. *Secretary of State*[2], *Sundarapandia Thevan* v. *Valathiappa Thevan*[3] *Narasimhulu* v. *Narasimhulu*[4], *Audirazu Veerayya* v. *Adirazu Sangayya*[5], *Devineni Pattayya* v. *Chelsani Badrayya*[6], *Vanchinatha Iyer* v. *Rajagopala Iyer*[7]. *Kandappa Asari* v. *Singara Chandid*[8], *Ramalingam* v. *Veerabhadrudu*[9], *Kajuluri Veeranna* v. *Tilapudi Venkayya*[10], *Tadipalli Venkatasastry* v. *Venkata Jagannadharao*[11], (see also discussion": When revenue Courts have jurisdiction " at page 47 and following and " When civil Courts have jurisdiction" at page 64 and following of the valuable monograph on the Madras Hereditary Village Offices Act, second edition, published by the M.L.J. (1959)).

1. (1897) 7 M.L.J. 196.
2. (1900) 10 M.L.J. 261 : I.L.R. 23 Mad. 571.
3. (1902) I.L.R. 26 Mad. 490.
4. (1906) 16 M.L.J. 514 : I.L.R. 30 Mad. 126 (F.B.).
5. (1910) 20 M.L.J. 281.
6. (1916) 5 L.W. 151.
7. (1921) 41 M.L.J. 372.
8. (1926) 25 L.W. 299.
9. (1935) 69 M.L.J. 890.
10. (1937) 1 M.L.J. 37.
11. (1947) 2 M.L.J. 256 : 60 L.W. 561 : I.L.R. (1948) Mad. 448.

It is well-settled that in deciding these matters the substance of the plaintiff's claim has to be looked into in deciding the question of jurisdiction but not the form of pleading ; *Dangeti Appanna* v. *Dangeti Venkataratnam*[1].

The learned advocate Mr. K. V. Srinivasa Ayyar relied upon two decisions as establishing his contention set out above. The first is *Ramalingamma* v. *Venkatasubbayya*.[2] In this case the facts were : A suit for recovery of possession of land was brought alleging that the land was acquired by the plaintiff's husband as service tenure inam with hereditary rights and he was enjoying the said property by rendering the said service and that after his death the property passed to the plaintiff, his widow, by heirship and that she had been in enjoyment of it subsequently but was deprived of it unlawfully by the defendant. It was contended for the defendant that the property being washerman service inam a suit for recovery of possession in respect of it could only be heard by the revenue Court and the civil Court would have no jurisdiction. It was held that the suit for recovery of possession on the foot of trespass was congizable under the common law by a civil Court, Krishnaswami Nayudu, J., brings home this point by observing :

" The present suit is a simple suit to claim possession of the land which the plaintiff was entitled to and has been in possession as heir, the property being village service inam land vested in the family. It cannot be said to be a suit for recovery of emoluments. If the decision of the suit requires an examination of the right of the plaintiff to the office, and also the question as to whether the land forms part of the office, which generally arises when there is a contest between the parties as to their respective claims to the office, or dispute regarding the nature of the property as to whether it is service inam or private land, then it would be reasonable to hold that it would come within the scope of the suits contemplated under section 13 (1) of the Act III of 1895."

In *Matcharayya* v. *Chintanna*[3], the learned Chief Justice Subba Rao, has made the position crystal clear as follows :

"To summarise, section 21 ousts the jurisdiction of civil Courts only in regard to matters in respect whether jurisdiction is conferred under section 13 on the Revenue Court. A suit by a service holder, claiming a right to succeed or in actual possession of the office for recovery of the emoluments is cognizable by a Revenue Court. The denial of the character of the property by the defendant does not affect the jurisdiction. But the essential requisite is that the plaintiff shall allege and rely upon the fact that the land is an emolument attached to the office and make that a foundation for the relief claimed. But, if his cause of action and his right to possession do not depend upon his title to the emoluments as a service holder, but on a collateral fact, section 21 is not a bar. If he is dispossessed by a trespasser, if his lessee refuses to deliver possession after the expiry of the term, if a person holding a derivative title under him does not give him possession after the termination of the derivative title either on the expiry of the term or otherwise, in all these cases his cause of action and his right to relief do not depend upon his title as a service holder, to the emoluments but only on his right to possession ".

" If the aforesaid principles are applied what will be the result in the present case ? The plaintiff's father permitted the defendants to enjoy the suit property doing service during his lifetime. After his death, instead of returning the land to his heirs, they continued in possession as trespassers. The plaintiffs are entitled to succeed, if they establish that their father permitted the defendants to enjoy the land for a purpose and that the permission given was revoked by his death. It is not necessary for them to prove that they are service-holders and that the lands are emoluments annexed to the service. If so, it follows that section 21 is not a bar to the maintainability of the suit in a civil Court".

We find that these decisions do not support the contention of the appellant.

In the result, there are no merits in this appeal. It is hereby dismissed with costs : one set. The Court-fee due to the Government will be paid by the appellant.

V.S. *Appeal dismissed.*

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1. (1956) An.W.R. 659.
2. (1953) 1.M.L.J. 789 : 66 L.W. 423.
3. (1954) 2 M.L.J. (Andh.) 133 : A.I.R. 1955 Andhra 15.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE ANANTANARAYANAN.

G. Radhakrishna Chettiar and others .. *Appellants**

v.

The Commissioner, Hindu Religious and Charitable Endowments, Madras .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 6 (13) and 6 (14)—Religious Charity and Religious Endowment—Public—What constitutes.

Under section 6 (13) of the Madras Hindu Religious and Charitable Endowments Act, 1951, religious charity, includes a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with a temple, mutt or not. Similarly section 6 (14) has been widened in its scope and section 6 (16) defining specific endowments now attracts religious charities as defined in section 6 (13). Since the charitable institution in the instant case was intended to feed Arya Vysya Pilgrims to religious festivals upon the stated occasions the endowment would be a 'religious charity' even apart from the performance of puja and nevedyam.

The Arya Vysyas of the region would constitute the " public " within the scope of that term.

Appeal against the decree of the Court of the Subordinate Judge of Tiruchirapalli, dated 17th August, 1955, in O.S. No. 233 of 1953.

K. S. Ramaratnam, for Appellants.

The Government Pleader and *N. S. Srinivasan*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is an appeal by the plaintiffs in the Court below in a suit filed under section 62 of the Hindu Religious and Charitable Endowments Act, Madras Act (XIX of 1951), to set aside the order of the Commissioner of Hindu Religious and Charitable Endowments in respect of the suit chatram properties.

The facts are that this chatram was created by a deed of trust dated 26th November, 1942 (Exhibit B-1) for the benefit of members of the Arya Vysya community of that area, who visit Gunaseelam for the purpose of participating in specified religious festivals in the month of Purattasi. Exhibit B-2 is a subsequent transfer of the management of this trust executed by the original founder, Venkatachala Chettiar and others. The simple point involved in this appeal is whether the Commissioner of Hindu Religious and Charitable Endowments was justified in notifying this charity as one within the ambit of Madras Act (XIX of 1951), because it was a religious charity (section 6, sub-section (13) or a religious endowment (section 6, sub-section (14), or 'a specific endowment' (section 6, sub-section (16)).

Learned counsel for the appellants placed two arguments in the forefront of his submissions. The first is that the learned Subordinate Judge was in error in relying upon the later document Exhibit B-2 as superseding the earlier document Exhibit B-1. It is the earlier document Exhibit B-1 which determines the conditions of the trust and which also enunciates the objects of the trust. Under that document it is not mentioned that puja and neivedyam should be done upon the relevant festival days, though this object is found in Exhibit B-2. The second argument is that, in any event, the Arya Vysya section of the community in this locality or district, cannot be said to constitute the public, within the nomenclature of section 6, sub-section (13) or sub-section (14) or sub-section (16).

We have carefully considered these arguments, and they do not appear to us to be tenable. It is not now necessary to consider whether the learned Subordinate Judge was justified in his finding that the *puja* and *neivedyam* had to be performed at the temple during the Radothsavam, when there is no specific mention of the place of

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*Appeal No. 43 of 1956. 5th November, 1959. (14th Kartika, 1881—Saka.)

puja in the second document, Exhibit B-2. But presumably, the *puja* and *neivedyam* had to be performed at the temple, as this is in consonance with the usual religious practice. This apart, we are unable to subscribe to the inference that the performance of this religious ritual was not one of the objects of the trust. For, it is perfectly probable and possible that all the objects of the trust might not have been enumerated in the very first document and a legitimate object of the trust might be enumerated in a later document. Consequently, it cannot be said that the performance of *puja* and *neivedyam* are not objects of the trust; and, since admittedly they are performances of a religious character, the property would be a 'religious charity' within the meaning of section 6, sub-section (13) of the Act.

Even apart from this, and upon a wider ground, the contentions of the learned counsel are unsustainable. The decisions placed before us, such as the decision in *The President, H. R. E., Madras* v. *Venkatarama*[1], related to the provisions of the Act prior to recent amended Act, and this is highly significant. *The President, H.R.E., Madras* v. *Venkatarma*[1], did concern an alleged specific endowment in this very district and shrine of Gunaseelam, and the learned Judges (Govinda Menon and Basheer Ahmed Sayeed, JJ.) stated that the endowment was not a specific endowment, because the property was not dedicated for the performance of a specific service or charity in a temple or mutt. But this is now no longer necessary. Under section 6, sub-section (13) 'religious charity' includes a public charity associated with a Hindu festival, or observance of a religious character, whether it be connected with a mutt or temple or not. Similarly, section 6, sub-section (14) has been widened in its scope and section 6, sub-section (16) defining 'specific endowment' now attracts 'religious charities' as defined in section 6, sub-section (13) of the Act. Since, the admitted facts of the present case are that this charitable institution was intended to feed Arya Vysya pilgrims to these religious festivals, upon the stated occasions this endowment would be a 'religious charity', even apart from the performance of *puja* and *naivedyam*. Those latter objects indisputably determine its character as religious charity and specific endowment, to which the provisions of the Act are applicable.

The further argument that the matter is different, because the plaintiffs form a society which is now registered, has no substance. The decision in *Commissioner, H.R.E. Board* v. *Vinayakar A. T. Sabha*[2], has no application at all to the present facts because that related to the definition of a 'specific endowment' under Madras Act (II of 1927) and prior to the cnactment of Madras Act (XIX of 1951). Consequently, those criteria are not applicable to the present definitions which have been deliberately made far wider in their scope.

The last argument is that the Arya Vysyas of this region do not constitute 'the public' within the scope of that term. This is opposed to the manner in which the word 'public' has been used, and described, both in section 6 (4) relating to 'charitabeen endowment', and section 6 (17) relating to 'temples'. Even this apart in *Sri Venkatarama Devaru* v. *State of Mysore*[3], the Supreme Court has clearly held that the word 'public' includes, in its ordinary acceptation, any section of the public. This makes an end of the argument that this is not a religious charity referable to a public purpose.

The decision of the learned Additional Subordinate Judge was therefore, correct. We dismiss this appeal, but, under the circumstances, without costs.

V.S. *Appeal dismissed.*

END OF VOLUME (1960) I M.L.J. (REPORTS.)

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1. (1953) 2 M.L.J. 357: A.I.R. 1954 Mad. 65.
2. (1952) 1 M.L.J. 182 at 183.
3. (1958) 1 M.L.J. (S.C.) 109: (1958) 1 An.W.R. (S.C.) 109: 1958 S.C.R. 895: (1958) S.C.J. 382 at 391 (S.C.).

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I] JANUARY [1960

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P.B. GAJENDRAGADKAR AND K N. WANCHOO, JJ.

Shiva Jute Baling Limited .. *Appellants**

v.

Hindley and Company Limited .. *Respondents.*

Arbitration Act (X of 1940), sections 35 and 33—Scope and effect—Arbitration proceedings pending legal proceedings—When valid—Contract Act (IX of 1872), sections 73 and 74—Scope.

Section 33 of the Arbitration Act contemplates an application for three purposes, namely, (i) when it is desired to challenge the existence of an arbitration agreement (ii) when it is desired to challenge its validity and (iii) when it is desired to have its effect determined. Where an arbitration agreement arises out of a term contained in a contract which deals with various other matters section 33 is concerned only with the term relating to arbitration and not with the other terms of the contract which do not arise for consideration on an application under that section. Section 35 makes proceedings before the arbitrators invalid in the absence of an order under section 34 staying the legal proceedings, where the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Prayers under section 33 relating to the existence and validity of the arbitration agreement not being matters within the competence of the arbitrators there can be no identity of the subject-matter under reference to arbitrators and the subject-matter of the prayers in the application under section 33. Section 35 in consequence can have no application and the award passed by the arbitrators cannot be assailed on the ground that it violates section 35.

Where the contract provides the measure of liquidated damages over and above the difference between the contract price and the market price on the date of default, it cannot be said that it was *per se* unreasonable and was therefore bad according to the law of India as laid down in sections 73 and 74 of the Contract Act. Section 74 of the Contract Act contemplates that the maximum reasonable compensation may be the amount which may be named in the contract.

Appeal from the Judgment and Decree, dated the 4th February, 1953, of the Calcutta High Court in Appeal from Original Decree No. 68 of 1952, arising out of the Judgment and Decree, dated the 14th January, 1952, of the said High Court in Special Suit No. 2 of 1951.

N. C. Chatterjee and *C. B. Agarwala*, Senior Advocates (*Sukumar Ghose*, Advocate, with them), for the Appellants.

B. Sen, Senior Advocate (*S. N. Mukherjee*, Advocate and *S. N. Andley*, *J. B. Dadachanji* and *Rameswar Nath*, Advocates of Messrs. Rajinder Narain & Co., with him) for the Respondents.

* Civil Appeal No. 262 of 1955. 21st August, 1959.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Calcutta High Court. The appellant is a company, incorporated in India, with its registered office in Calcutta dealing in jute. It entered into a contract on June 18, 1945, with the respondent-company, which is incorporated in England and has its registered office in London. The contract was for the supply of five hundred bales of jute of crop 1945-46 to be shipped from Calcutta or Chittagong to Rio de Janeiro, when freight became available. The contract provides that in the event of default of tender or delivery, the seller shall pay to the buyer as and for liquidated damages 10s. per ton plus the excess (if any) of the market value over the contract price, the market value being that of jute contracted for on the day following the date of default. This date was to be the date in London on declaration of default by telegram or without such declaration if default was eventually made by lapse of time on the 21st day after expiry of the extended period. There is also a provision for arbitration, which lays down that any claim or dispute whatever arising out of, or in relation to this contract or its construction or fulfilment shall be referred to arbitration in London in accordance with the bye-laws of the London Jute Association, and it was open to either party to claim arbitration whenever and as often as disputes arose. The contract also provides for an appeal by any party dissenting from an arbitration award to the London Jute Association in accordance with the regulations in force for the time being. Lastly, it is provided that the contract would be construed according to the laws of England whatever the residence and nationality of the parties might be or become and would be deemed to be performed there. The Courts of England or arbitrators, as the case might be, would have exclusive jurisdiction over all disputes which might arise under the contract, except for the purpose of enforcing in the Colonies or abroad any arbitration award made under this contract.

On June 23, 1947, thirty-nine bales of jute were consigned by the appellant to Rio de Janeiro in part performance of the contract and information of this was given to the respondent by letter on July 17, 1947. It was said in this letter that difficulty had arisen because of the non-availability of quota and it was hoped that the balance remaining under the contract would be shipped as soon as quota was available. The respondent sent a reply to this letter on July 25, 1947, and the appellant wrote a further letter on August 1, 1947, in which it was said that the remaining amount of jute under the contract would be shipped as soon as the quota was available.

We do not know what happened thereafter till we come to August, 1948. It seems that the respondent received a cable on August 12, 1948, from the appellant stating that the contract stood cancelled long ago. The respondent by its letter dated August 12, 1948, refused to accept this position. Thereafter there were disputes and differences between the parties and eventually the respondent claimed default on or about June, 1949, in terms of the contract. On or about July 14, 1949, the respondent referred the matter to the arbitration of the London Jute Association which appointed two of its members as arbitrators. The respondent filed its claim before the Arbitrators on July 23, 1949. On July 27, 1949, the Arbitrators gave notice to the appellant to file its answer by August 19, 1949. The appellant, however, filed no answer before the Artbitrators. What the appellant did in reply was to file an application under section 33 of the Indian Arbitration Act (X of 1940), (hereinafter called the Arbitration Act) on the Original Side of the Calcutta High Court, in which it made three prayers, namely—

(*a*) declaration that the arbitration agreement, if any, between the parties was void *ab initio* on the ground of uncertainty and was not binding on the appellant ;

(*b*) declaration that there was in fact and in law no contract between the parties on account of mutual mistake of the parties; and

(*c*) that the Court might be pleased to adjudicate on the existence and/or validity of the alleged arbitration agreement and the effect of the same.

This application was moved on August 12, 1949. It appears that on August 13, 1949, the appellant sent a cable to the respondent and the London Jute Association informing them that an application had been made in the Calcutta High Court challenging the submissions contained in the contract and that the Arbitrators had become *functus officio* pending disposal of the application, which was fixed for August, 29. The appellant received a reply to its cable in which it was asserted that no such application as the appellant had made to the Calcutta High Court could be made there and that the Arbitrators would proceed with the adjudication on August 27 as already fixed. On August 17, 1949, the appellant sent a letter to the London Jute Association in which it referred to its cable and the reply of the Association to that and reiterated its stand that any further steps taken in the arbitration proceedings pending disposal of the application under section 33 would be invalid under the Arbitration Act. The Arbitrators, however, proceeded with the arbitration and gave their award on October 17, 1949.

No proceedings thereafter were taken by the appellant in London, nor does it appear that any steps were taken by it to have its application under section 33 decided, till we come to November 26, 1951. On that date, an application was filed by the respondent in the Calcutta High Court under section 5 of the Arbitration (Protocol and Convention) Act, 1937 (VI of 1937), (hereinafter called the Protocol Act). Along with this application it filed the award, dated October 17, 1949, and prayed that judgment be pronounced in accordance with the award and decree be passed accordingly. Notice of this was issued to the appellant, which filed its reply on January 14, 1952. We do not think it necessary to set out the petition of the respondent under section 5 of the Protocol Act and the appellant's reply thereto in detail, because when the matter came to be heard in Court only two points were urged on behalf of the appellant, namely—

(1) that the award was made after the notice of filing of the petition, dated 10th August, 1949, under section 33 of the Arbitration Act had been given to the respondent and the Arbitrators, and consequently award made after the receipt of the said notice and during the pendency of the said application was bad under section 35 of the Arbitration Act ; and

(2) that the award was bad on the face of it and could not therefore be enforced in view of the provisions of section 7 (*e*) of the Protocol Act, which lays down that an award cannot be enforced in India if it is contrary to the law of India. It was contended that the award was contrary to the law of India and this appeared on the face of it inasmuch as the Arbitrators had purported to award such damages as could not be done under the provisions of the Indian Contract Act (IX of 1872).

Both these contentions were negatived by the learned Single Judge and he ordered the award to be filed in Court and passed a decree in terms thereof.

The appellant then went up in appeal, which was heard by a Division Bench of the Calcutta High Court. The grounds of appeal show that the same two points, which were urged before the learned Single Judge, were reiterated therein. When the matter came to be heard before the Division Bench, the same two points were raised on behalf of the appellant there also. The Division Bench negatived the two contentions raised before it on behalf of the appellant and confirmed the judgment of the learned Single Judge. It is curious, however, to notice that though all these proceedings were being taken on the application under section 5 of the Protocol Act the appellant apparently took no steps to have its application under section 33 of the Arbitration Act, which seems to have been adjourned *sine die*, decided along with the respondent's application under section 5 of the Protocol Act.

This was followed by a application for a certificate to appeal to this Court, which was refused. Then the appellant applied to this Court for Special Leave to appeal, which was granted. In the Special Leave Petition also the appellant raised the same two points, namely, (i) the construction of sections 33 and 35 of the Arbitration Act and the application of these provisions to the facts of this case, and (ii) the construction of section 7 of the Protocol Act and the Indian Contract Act with respect to the damages awarded by the award.

In the statement of case also after narrating the facts and circumstances, the same two points were mentioned as the principal questions which arose for determination in the appeal, namely, (i) the effect of sections 33 and 35 of the Arbitration Act on the facts and circumstances of this case, and (ii) the interpretation of section 7 of the Protocol Act in the light of sections 73 and 74 of the Indian Contract Act and their bearing on the damages awarded by the Arbitrators and its effect on the validity of the award.

Learned counsel for the appellant, however, wanted to raise before us other points arising out of section 7 of the Protocol Act. We do not think that the appellant should be permitted to raise at this late stage any new point in addition to the two points which were urged before the learned Single Judge and which only have all along been raised in the appeal to the High Court and in the appeal before this Court. We shall therefore confine the appellant to these two points only and proceed on the assumption in the same manner as has been done by the High Court, namely, that an application under section 33 of the Arbitration Act would lie in the circumstances of this case and therefore the provisions of section 35 of the Arbitration Act would be attracted.

Re.—(1) The part of section 33 of the Arbitration Act, relevant for our purpose, lays down that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or to have its effect determined shall apply to the Court and the Court shall decide the question. It will thus be clear that section 33 contemplates an application for three purposes, namely, (i) when it is desired to challenge the existence of an arbitration agreement, (ii) when it is desired to challenge its validity, and (iii) when it is desired to have its effect determined. An arbitration agreement may come into existence in one of two ways ; it may either arise out of an agreement which contains nothing else besides arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract, which is the present case. Where one is dealing with an arbitration agreement of the second kind, section 33 is concerned only with the term relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section.

Then we come to section 35. It provides that no reference or award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-mattter of the reference has been commenced between all the parties to the reference and a notice thereof has been give to the Arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid. It will be seen, therefore, that section 35 makes proceedings before the Arbitrators invalid in the absence of an order under section 34 staying the legal proceedings, where the whole of the subject-matter of the reference is covered by any legal proceedings taken with respect to it. In other words, an Arbitrator can continue the proceedings and proceed to make the award on the reference, unless the whole of the subject-matter of the reference is covered by the legal proceedings which have been instituted. Assuming that the proceedings taken under section 33 are " legal proceedings ", mentioned in section 35, the question which immediately arises on the facts of the present case is whether the whole of the subject-matter of the reference in this case was covered by the legal proceedings taken by the appellant by its application under section 33 of the Arbitration Act.

In dealing with this aspect of the case, learned counsel for the appellant raised the question of frustration of the contract and the powers of the Court and the Arbitrator in that behalf. It is true that the words " frustration of contract" have been used in paragraph 8 of the application. But the prayers do not show that any relief was claimed on that ground, relief (*c*) being merely a repetition of the words of section 33 of the Arbitration Act. Learned counsel relied on *Heymen* v. *Darwins Ltd.*[1]

1. L.R. (1942) A.C. 356.

in this connection. We do not think we should permit the appellant to raise this contention at this late stage and would content ourselves by pointing out incidentally that even if the dictum in *Heymen's case*[1], is accepted, it will not help the appellant for on that dictum the question of frustration would be for the Arbitrators to decide on the basis of the terms used in this contract which are of the widest amplitude and would not be a matter for consideration of the Court. On this basis there would be no identity of subject-matter between what can be raised in an application under section 33 on the facts of this case and what can be decided by the Arbitrators. However, we do not propose to pursue this matter any further and to decide it.

Then we turn to prayers (*a*) and (*b*) of paragraph 9 of the application based on paragraphs 6 and 7 thereof. These prayers undoubtedly cannot be the subject-matter of arbitration, for they go to the very root of the contract and imply that there was no contract between the parties at all and therefore no arbitration agreement. These prayers can certainly form the basis of an application under section 33, for they relate to the existence and validity of the arbitration agreement contained in the contract ; but not being matters within the competence of the Arbitrators, there can be no identity of the subject-matter under reference to the Arbitrators and the subject-matter of prayers (*a*) and (*b*). The conclusion, therefore, is that prayers (*a*) and (*b*) can be the subject-matter of an application under section 33 but they cannot be the sub-ject-matter of the reference to the Arbitrators. Therefore, the subject-matter of the legal proceedings under section 33 in this case cannot and does not cover any part of the subject-matter of the reference. Section 35 in consequence can have no application and the award cannot be assailed as invalid on the ground that it violates section 35 of the Arbitration Act. The first contention, therefore, must fail.

Re. (2)—

The argument under this head is that the liquidated damages provided under clause (12) of the contract include not only the difference between the contract price and the market price on the date of default but also a further sum of 10 s. per ton. Reference in this connection is made to sections 73 and 74 of the Indian Contract Act, 1872 (IX of 1872) and it is said that the extra amount of 10 s. per ton included in the sum of liquidated damages is against the provision of these sections and therefore the award being against the law of India is bad on the face of its and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. What clause (12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely, (i) the difference between the contract price and the market price on the date of default, and (ii) an addition of 10 s. per ton above that. There is nothing in section 73 or section 74 of the Contract Act, which makes the award of such liquidated damages illegal. Assuming that the case is covered by section 74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the Arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in clause (12) it should

1. L.R. (1942) A.C. 356.

have appeared before the Arbitrators and represented its case. It cannot now be heard to say that simply because clause (12) provided for a further sum of 10 s. per ton over and above the difference between the contract price and the market price on the date of the default, this was *per se* unreasonable and was therefore bad according to the law of India as laid down in sections 73 and 74 of the Contract Act. Both these sections provide for reasonable compensation and section 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. In this case the arbitrators have awarded the maximum amount so named and nothing more. Their award in the circumstances cannot be said to be bad on the face of it, nor can it be said to be against the law of India as contained in these sections of the Contract Act. The second contention must also fail.

We, therefore, dismiss the appeal with costs to the respondent.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND K. SUBBA RAO, JJ.

British India General Insurance Co., Ltd. .. *Appellants**

v.

Captain Itbar Singh and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 96 (2) *and* (6)—*Insurers subsequently added as defendants to action against owners of cars (who had insured against third party risks) for damages caused by negligent driving of cars—If can take grounds of defence other than those specified in sub-section* (2):

Apart from statute an insurer of the owner of a car against third party risks has no right to be made a party to an action for damages by an injured person against the insured causing the injury. Sub-section (2) of section 96 of the Motor Vehicles Act, however, gives him the right to be made a party to the suit and defend it. The right, therefore, is created by statute and the content necessarily depends on the provisions of the statute. On the language of sub-section (2) an insurer to whom the requisite notice of the action has been given " shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely," after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. Sub-section (6) of the section clearly contemplates that he cannot take any defence not mentioned in sub-section (2).

Appeals from the Order, dated the 27th April, 1955, of the Punjab High Court, in Civil Revisions Nos. 81-D of 1953 and 96-D of 1953 respectively.

C. K. Daphtary, Solicitor-General of India (*Rambehari Lal, D.K. Kapur* and *Sardar Bahadur*, Advocates, with him), for Appellants.

Dipak Datta Chaudhuri and *T. P. S. Chawla*, Advocates, for Respondent No. 1 in C.A. No. 413 of 1958.

Anup Singh, Advocate, for Respondents Nos. 1 to 3 in C.A. No. 414 of 1958.

G. C. Mathur, Advocate, for Respondent No. 5 in C.A. No. 414 of 1958.

The Judgment of the Court was delivered by

Sarkar, J.—These two appeals arise out of two suits and have been heard together. The suits had been filed against owners of motor cars for recovery of damages suffered by the plaintiffs as a result of the negligent driving of the cars. The owners of the cars were insured against third party risks and the insurers were subsequently added as defendants to the suits under the provisions of sub-section (2) of section 96 of the Motor Vehicles Act, 1939. The terms of that sub-section will have to be set out later, but it may now be stated that it provided that an insurer added as a party to an action under it was entitled to defend on the grounds enumerated in it.

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* Civil Appeals Nos. 413 and 414 of 1958. 11th May, 1959.

On being added as defendants, the insurers filed written statements taking defences other than those mentioned in that sub-section. The plaintiffs contended that the written statements should be taken off the records as the insurers could defend the action only on the grounds mentioned in the sub-section and on no others. A question thereupon arose in the suits as to what defences were available to the insurers. In one of the suits it was held that the insurers could take only the defences specified in that sub-section and in the other suit the view taken was that the insurers were not confined to those defences. Appeals were preferred from these decisions to the High Court of Punjab. The High Court held that the insurers could defend the actions only on the grounds mentioned in the sub-section and on no others. Hence these appeals by the insurers.

The question is whether the defences available to an insurer added as a party under section 96 (2) are only those mentioned there. A few of the provisions of the Motor Vehicles Act have now to be referred to. Section 94 of the Act makes insurance against third party risk compulsory. Section 95 deals with the requirements of the policies of such insurance and the limits of the liability to be covered thereby. Sub-section (1) of this section provides :

"........a policy of insurance must be a policy which—

(*a*) ....

....

(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle in a public place."

Sub-section (2) of section 95 specifies the limits of the liability for which insurance has to be effected, and it is enough to say that it provides that in respect of private cars, which the vehicles with which these appeals are concerned were, the insurance has to be for the entire amount of the liability incurred. Then comes section 96 round which the arguments advanced in this case have turned and some of its provisions have to be set out.

"*Section* 96. (1) If, after a certificate of insurance has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected ; judgment in respect of any such liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding, *e.g.*, that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :—

(*a*) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of section 105 ; or

(*b*) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :—

(i) a condition excluding the use of the vehicle—

(*a*) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(*b*) for organised racing and speed testing, or

(*c*) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a public service vehicle or a goods vehicle, or

(*d*) without side-car being attached, where the vehicles is a motor cycle ; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion ; or

(*c*) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(2-A) ....

....

(3) Where a certificate of insurance has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (*b*) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (*b*) of sub-section (1) of section 95, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(5) ....

....

(6) No insurer to whom the notice referred to in sub-section (2) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) otherwise than in the manner provided for in sub-section (2)."

It may be stated that the policies that were effected in these cases were in terms of the Act and the certificate of insurance mentioned in section 96 had been duly issued. It will have been noticed that sub-section (1) of section 96 makes an insurer liable on the judgment obtained by the injured person against the assured. Sub-section (2) provides that no sum shall be payable by the insurer under sub-section (1) unless he has been given notice of the proceedings resulting in that judgment, and that an insurer who has been given such a notice shall be entitled to be made a party to the action and to defend it on the grounds enumerated. The contention of the appellants is that when an insurer becomes a party to an action under sub-section (2), he is entitled to defend it on all grounds available at law including the grounds on which the assured himself could have relied for his defence and that the only restriction on the insurers right of defence is that he cannot rely on the conditions of the policy which sub-section (3) makes as of no effect. This is the contention which we have to examine in these appeals.

To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-section (2) makes available to an insurer ? That clearly is a question of interpretation of the sub-section.

Now the language of sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given "shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely" after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.

Sub-section (6) also indicates clearly how sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under sub-section (1) " otherwise than in the manner provided for in sub-section (2) ". Now the only manner of avoiding liability provided for in sub-section (2) is by successfully raising any of the defences therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore sub-section (6) clearly contemplates that he cannot take any defence not mentioned in sub-section (2). If he could, then he would have been in a position to avoid his liability in a manner other than that provided for in sub-section (2). That is prohibited by sub-section (6).

We therefore think that sub-section (2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it.

Three reported decisions were cited at the bar and all of them proceeded on the basis that an insurer had no right to defend the action except on the grounds mentioned in sub-section (2). These are *Sarup Singh* v. *Nilkant Bhaskar*[1], *Royal Insurance Co. Ltd.* v. *Abdul Mahomed*[2], and *The Proprietor, Andhra Trading Co.* v. *K. Muthuswamy*[3]. It does not appear however to have been seriously contended in any of these cases that the insurer could defend the action on a ground other than one of those mentioned in sub-section (2).

The learned counsel for the respondents, the plaintiffs in the action, referred us to the analogous English statute, The Road Traffic Act, 1934, in support of the view that the insurer is restricted in his defence to the grounds set out in sub-section (2). But we do not think it necessary to refer to the English statute for guidance in the interpretation of the section that we have to construe.

We proceed now to consider the arguments advanced by the learned Solicitor-General who appeared for the appellants. He contended that there was nothing in sub-section (2) to restrict the defence of an insurer to the grounds therein enumerated. To support his contention, he first referred to sub-section (3) of section 96 and said that it indicated that the defences that were being dealt with in sub-section (2) were only those based on the conditions of the policy. His point was that sub-section (2) permitted defences on some of those conditions and sub-section (3) made the rest of the conditions of no effect thereby preventing a defence being based on any of them. He said that these two sub-sections read together show that sub-section (2) was not intended to deal with any defence, other than those arising out of the conditions of the policy, and as to other defences therefore sub-section (2) contained no prohibition. He further said that as under sub-section (2) an insurer was entitled to be made a defendant to the action it followed that he had the right to take all legal defences excepting those expressly prohibited.

We think that this contention is without foundation. Sub-section (2) in fact deals with defences other than those based on the conditions of a policy. Thus clause (*a*) of that sub-section permits an insurer to defend an action on the ground that the policy has been duly cancelled provided the conditions set out in that clause have been satisfied. Clause (*c*) gives him the right to defend the action on the ground that the policy is void as having been obtained by non-disclosure of a material fact or a material false representation of fact. Therefore it cannot be said that in enacting sub-section (2) the Legislature was contemplating only those defences which were based on the conditions of the policy.

It also seems to us that even if sub-section (2) and sub-section (3) were confined only to defences based on the conditions of the policy that would not have led to the conclusion that the Legislature thought that other defences not based on such conditions, would be open to an insurer. If that was what the Legislature intended, then

1. I.L.R. (1953) Bom. 296.
2. I.L.R. (1954) Bom. 1422.
3. (1956) 1 M.L.J. 477 : I.L.R. (1957) Mad. 306 : A.I.R. 1956 Mad. 464.

there was nothing to prevent it from expressing its intention. What the Legislature has done is to enumerate in sub-section (2) the defences available to an insurer and to provide by sub-section (6) that he cannot avoid his liability excepting by means of such defences. In order that sub-section (2) may be interpreted in the way the learned Solicitor-General suggests we have to add words to it. The learned Solicitor-General concedes this and says that the only word that has to be added is the word " also " after the word " grounds ". But even this the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning, neither of which we think it is. The addition suggested will, in our view, make the language used unhappy and further effect a complete change in the meaning of the words used in the sub-section.

As to sub-section (6) the learned Solicitor-General contended that the proper reading of it was that an insurer could not avoid his liability except by way of a defence upon being made a party to the action under sub-section (2). He contended that the word ' manner ' in sub-section (6) did not refer to the defences specified in sub-section (2) but only meant, by way of defending the suit the right to do which is given by sub-section (2). We think that this is a very forced construction of sub-section (6) and we are unable to adopt it. The only manner of avoiding liability provided for in sub-section (2) is through the defences therein mentioned. Therefore when sub-section (6) talks of avoiding liability in the manner provided in sub-section (2), it necessarily refers to these defences. If the contention of the learned Solicitor-General was right, sub-section (6) would have provided that the insurer would not be entitled to avoid his liability except by defending the action on being made a party thereto.

There is another ground on which the learned Solicitor-General supported the contention that all defences are open to an insurer excepting those taken away by sub-section (3). He said that before the Act came into force, an injured person had no right of recourse to the insurer and that it was section 96 (1) that made the judgment obtained by the injured person against the assured binding on the insurer and gave him a right against the insurer. He then said that that being so, it is only fair that a person sought to be made bound by a judgment should be entitled to resist his liability under it by all defences which he can in law advance against the passing of it.

Again, we find the contention wholly unacceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on some one and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an incident in the happening of which he had no hand at all.

We therefore feel that the plain words of sub-section (2) should prevail and that no ground exists to lead us to adopt the extraordinary course of adding anything to it. We think that the High Court was right in the view that it took.

In the result these appeals are dismissed with costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM AND J. L. KAPUR, JJ.

Abdul Rahim Ismail C. Rahimtoola .. *Appellant**

v.

The State of Bombay .. *Respondent.*

Passport Act (XXXIV of 1920), *section* 3 *and Passport Rules* (1950), *Rules* 3 *and* 4—*Applicability—If restricted to non-Indian citizens—Constitutional validity—Constitution of India* (1950), *Article* 19 (1) (*d*) *and* (*e*) *and* (5).

Constitution of India (1950), *Article* 145 (3) *and* 143—*Substantial question of law—Question already decided by a bench of five Judges—If to be heard only by five Judges.*

Rules 3 and 4 of the Passport Rules, 1950 and section 3 of the Passport Act are *intra vires* and apply to all persons non-Indian citizens as well as Indian citizens. To require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India.

Ebrahim Vazir Mavat v. *The State of Bombay*, 1954 S.C.R. 933, followed.

Accordingly entry into India without a passport by even an Indian citizen is in contravention of Rule 3 of the Passport Rules, 1950 and therefore punishable under rule 6 (*a*).

Where the very question raised has been decided by a Bench of the Supreme Court consisting of five Judges it cannot be said that a substantial question of law as to the interpretation of the Constitution arises in the case requiring it to be decided by a Constitution Bench of five Judges under Articles 143 and 145 (3), of the Constitution.

Appeal from the Judgment and Order, dated the 4th July, 1957, of the Bombay High Court in Criminal Application for Revision No. 278 of 1956, arising out of the Judgment and Order, dated the 3rd January, 1956, of the Presidency Magistrate, 16th Court, Esplanade, Bombay, in Criminal Case No. 1913/P of 1955.

O. N. Srivatsava, Advocate and *J. B. Dadachanji*, Advocate of *Messrs. Rajinder Narain & Co.*, for Appellant.

G. C. Mathur and *R. H. Dhebar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Imam, J.—The appellant was convicted under rule 6 (*a*) of the Indian Passport Rules, 1950, hereinafter referred to as the Rules, made under section 3 of the Indian Passport Act (XXXIV of 1920) hereinafter referred to as the Act, and was sentenced to pay a fine of Rs. 100. The High Court in exercising its revisional jurisdiction upheld the conviction but reduced the sentence to a fine of Rs. 25. It granted a certificate to the appellant that the case was a fit one for appeal to this Court.

It is beyond dispute now that the appellant is a citizen of India. Admittedly he entered the territories of India without a passport. The sole question for determination is whether his act in so entering the territories of India amounted to an offence punishable under Rule 6 (*a*) of the Rules.

The Act was passed in 1920 and has been the subject of amendment and modification thereafter. Its Preamble states " whereas it is expedient to take power to require passports of persons entering India, it is hereby enacted as follows." " Passport " has been defined as a passport for the time being in force issued or renewed by the prescribed authority and satisfying the conditions prescribed relating to the class of passports to which it belongs. Section 3 states :

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* Crl. A. No. 182 of 1957. 14th May, 1959.

"(1) The Central Government may make rules requiring that persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose.

(2) Without prejudice to the generality of the foregoing power such rules may—

(*a*) prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him ;

(*b*) prescribe the authorities by whom passports must have been issued or renewed, and the conditions with which they must comply, for the purposes of this Act ; and

(*c*) provide for the exemption, either absolutely or on any condition, of any person or class of persons from any provision of such rules.

(3) Rules made under this section may provide that any contravention thereof or of any order, issued under the authority of any such rule shall be punishable with imprisonment for a term which may extend to three months, or with fine or with both.

(4) All rules made under this section shall be published in the Official Gazette, and shall thereupon have effect as if enacted in this Act."

Rule 3 of the Rules states :

" Save as provided in rule 4, no person, proceeding from any place outside India, shall enter, or attempt to enter, India by water, land or air unless he is in possession of a valid passport conforming to the conditions prescribed in rule 5."

Rule 4 specifies the persons who shall be exempted from the provisions of rule 3. Clause (*b*) or rule 4 exempts members of the Naval, Military or Air Forces of India on duty, and members of the family of any such person when accompanying such person to India on a Government transport. Clause (*c*) exempts persons domiciled in India proceeding from any of the French Establishments in India (other than Pondicherry and Karaikal) or from any of the Portuguese Establishments in India or Pakistan. Clause (*f*) exempts persons domiciled in India entering India by land or by air over the Nepalese or Tibetan frontier. Clause (*h*) exempts *bona fide* Mahomedan pilgrims returning from Jeddah or Basra and clause (*i*) exempts other persons or classes of persons specified by general or special orders of the Central Government.

The date of the appellant's entry into India is not known. He was certainly arrested on February 26, 1955, and it is his case that he entered India sometime after the decision of this Court in the case of *Ebrahim Vazir Mavat* v. *The State of Bombay*[1]. The judgment of this Court in that case was delivered on February 15, 1954. On that basis the appellant entered India sometime after February 15, 1954, and before February 26, 1955. It is unnecessary to specify in great detail the movements of the appellant between November 19, 1948, when he went to Karachi for the first time, and his arrest on February 26, 1955, as his movements during this period are not relevant in determining whether the appellant has committed an offence punishable under rule 6 (*a*) of the Rules. The case must be decided on the footing that sometime before his arrest on February 26, 1955, the appellant entered India without a passport.

Two contentions were raised on behalf of the appellant (1) that rule 3 of the Rules and section 3 of the Act were *ultra vires* the Constitution in so far as they purported to affect the right of an Indian citizen to enter India without a passport and (2) that on a proper interpretation of the provisions of section 3 of the Act and rule 3 of the Rules, these provisions did not apply to an Indian citizen. They applied only to non-Indian citizens.

As to the first contention it was urged that section 3 of the Act and rule 3 of the Rules in so far as they purported to relate to an Indian citizen were *ultra vires* the Constitution, as they offended against the provisions of Article 19 (1) (*d*) and (*e*). Article 19 (1) (*d*) confers the fundamental right on all Indian citizens " to move freely throughout the territory of India" and Article 19 (1) (*e*) "to reside and settle in any part of the territory of India ". This fundamental right, however, is subject to reasonable restrictions under clause (5) of Article 19. In the case of *Ebrahim*

1. 1954 S.C.R. 933.

Vazir Mavat v. *The State of Bombay*[1], the majority judgment of this Court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded as a proper restriction upon entry. This Court, however, held that it was quite a different matter to say that if he enters India without a permit he may on conviction for such offence be ordered to be removed from India. It was the order directing his removal from India which was held by this Court to be tantamount to taking away his fundamental right guaranteed under Article 19 (1) (*e*) "to reside and settle in any part of the territory of India". It is clear, therefore, that so far as this Court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India. This decision is binding on us and we must follow the decision of this Court in the case referred to. It was, however, urged that as a constitutional question has been raised this matter cannot be decided by Judges less than five in number. Therefore, the case should be referred to what is described as the Constitution Bench. Article 145 (3) of the Constitution states that the minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution or for the purpose of hearing any reference under Article 143 shall be five. It is clear that no substantial question of law as to the interpretation of the Constitution arises in the present case as the very question raised has been decided by a Bench of this Court consisting of five Judges. As the question raised before us has been already decided by this Court it cannot be be said that any substantial question of law arises regarding the interpretation of the Constitution.

As to the second submission made we have no hesitation is saying that the words used in section 3 of the Act and rules 3 and 4 of the Rules make it quite clear that they apply to every person including an Indian citizen. Under section 3 (1) of the Act the word "persons" has been stated without any qualification. Under section 3 (2) (*a*) the words employed are "any person" and in rule 3 the words employed are "no person". Clause (*b*) of rule 4 obviously applies to Indian citizens but those mentioned in that clause have been specifically exempted from the operation of rule 3. Clause (*h*) of rule 4 (1) can apply to Indian citizens who are by religion Mahomedan. They have been exempted. Therefore, on a reasonable interpretation of section 3 of the Act and rules 3 and 4 of the Rules there can be no manner of doubt that these provisions apply to all persons including Indian citizens.

In our opinion, there can be no manner of doubt that the appellant's entry into India without a passport was in contravention of rule 3 of the Rules and therefore punishable under rule 6 (*a*) and the appellant was rightly convicted. The appeal is accordingly dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. SUBBA RAO, JJ.

Gullapalli Nageswararao and others .. *Appellants**

v.

The State of Andhra Pradesh and others .. *Respondents.*

Road Transport Corporations Act (*LXIV of* 1950)—*Bus transport undertaking taken over by Corporation—Objections of private bus operators—Competency of Chief Minister to hear and decide—Natural justice.*

Motor Vehicles Act (*IV of* 1939), *section* 68-*F* (2) *and Andhra Pradesh Motor Vehicles Rules, Rule* 11—*Construction and effect.*

There is a clear distinction between the position of a Secretary of the Department (Transport in the instant case) and the Chief Minister of the State. The former is a part of the department and the

1. 1954 S.C.R. 933.

* C.As. Nos. 198 to 200 of 1959. 21st August, 1959.

latter is only primarily responsible for the disposal of the business of the department. The Chief Minister cannot be said to be part of the department constituted as a statutory State Transport Undertaking under the Road Transport Corporation Act (1950). The Chief Minister accordingly is not disqualified from deciding a dispute between the department and private bus operators.

The entire scehme of the Act visualizes, in case of conflict between the undertaking and the operators of private buses, that the State Government should sit in judgment and resolve the conflict.

A combined reading of section 68-F (2) of the Motor Vehicles Act and rule 11 of the Andhra Pradesh Motor Vehicles Rules makes it clear that the order contemplated under the said sub-section can be made by the Regional Transport Authority only after giving due notice to the persons likely to be affected by the said order. It is not sufficient compliance to issue the order and communicate it on the same day.

Appeals from the Judgment and Order, dated the 5th March, 1959, of the Andhra Pradesh High Court in Writ Petitions Nos. 1511 and 1512 of 1958 and 23 of 1959.

N. C. Chatterjee, Senior Advocate (*G. Suryanarayana, K. Mangachari* and *T. V. R. Tatachari*, Advocates, with him), for Appellants.

D. Narasaraju, Advocate-General for the State of Andhra Pradesh (*D. Venkatappiah Sastry* and *T. M. Sen*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals on certificates are directed against the judgment of the High Court of Judicature, Andhra Pradesh at Hyderabad, dismissing the petitions filed by the appellants under Article 226 of the Constitution for issuing writs of *certiorari* to quash the orders of the Government of Andhra Pradesh confirming a scheme of nationalisation of transport and the subsequent orders of the Regional Transport Authority cancelling the appellant's stage carriage permits.

These appeals are the offshoot of the judgment of this Court in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], delivered on November 5, 1958. The facts were fully stated therein. It would be only necessary to recapitulate briefly the facts relevant to the present enquiry: The appellants were carrying on motor transport business for several years in Krishna District in the State of Andhra Pradesh. Shri Guru Pershad, styled as the General Manager of the State Transport Undertaking of the Andhra Pradesh Road Transport, published a scheme for nationalisation of motor transport in the said State from the date to be notified by the State Government. Objections to the said proposed scheme were invited by the State Government and the appellants, among others, filed their objections. On December 26, 1957, the Secretary in charge of the Transport Department gave a personal hearing to the objectors and heard the representations made on behalf of the State Transport Undertaking. The entire material gathered by him was placed before the Chief Minister of the State in charge of transport, who made the order approving the scheme. The approved scheme was published in the *Andhra Pradesh Gazette*, dated January 9, 1958, and it was directed to come into force with effect from January 10, 1958. Thereafter the Andhra Pradesh Road Transport Corporation, which was formed under the provisions of the Road Transport Corporation Act, 1950, took over the Undertaking and proceeded to implement the scheme under a phased programme. The appellants moved this Court under Article 32 of the Constitution for quashing the said scheme on various grounds. This Court rejected most of the objections raised by the appellants except in regard to two pertaining to the hearing given by the Secretary in charge of the Transport Department which resulted in the quashing of the order of the Government approving the scheme and directing it to forbear from taking over any of the routes on which the appellants were engaged in transport business. After the said order, notices were issued by the Government to all the objectors informing them that a personal hearing would be given by the Chief Minister on December 9, 1958, and they were further informed that they were at liberty to file further objections before November 30, 1958. The Chief Minister heard the representatives of the objectors

1. (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An. W.R. (S.C.) 156 : (1959) S.C.J. 967 : A.I.R. 1959 S.C. 308.

and the Corporation and passed orders dated December 19, 1958, rejecting the objections filed and approving the scheme as originally published. The order approving the scheme was duly published by the Government in the official Gazette on December 22, 1958. On December 23, 1958, the Corporation applied to the Road Transport Authority for the issue of permits for plying stage carriages and for eliminating the permits granted to the private bus operators. On December 24, 1958, the said Authority passed orders rendering the permits of the appellants ineffective from December 24, 1958, and also issuing permits to the Corporation in respect of the routes previously operated by the appellants. The said orders were communicated to the appellants on December 24, 1958, and they were also directed to stop plying their buses from December 25, 1958, on their respective routes. The appellants, who were aggrieved by the orders of the Government as well as by the order of the Regional Transport Authority filed petitions in the High Court under Article 226 of the Constitution for quashing the same.

The petitions were heard by a Division Bench of the said High Court consisting of Chandra Reddy, C.J., and Srinivasachari, J., who negatived the contentions raised by the appellants and dismissed the petitions. Hence these appeals.

The arguments of Mr. Chatterjee, learned counsel for the appellants, may be summarized thus : (1) This Court held in *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], that the Secretary in charge of the Transport Department was disqualified from deciding the dispute between the Department and the private bus operators on the basis of the principle that a party cannot be a judge in his own cause, and that, as the Chief Minister was in charge of the portfolio of transport, the same infirmity attached to him also, and, therefore, for the same reason he should also be disqualified from hearing the objections to the scheme published by the Undertaking ; and (2) the Chief Minister by his acts, such as initiating the scheme, and speeches showed a clear bias in favour of the Undertaking and against the private bus operators and therefore on the basis of the principles of natural justice accepted by this Court, he was precluded from deciding the dispute between the said parties.

The learned Advocate-General sought to make out a distinction between "official bias" of an authority which is inherent in a statutory duty imposed on it and "personal bias" of the said authority in favour of, or against, one of the parties and contended that the mere fact that the Chief Minister of the Government had supported the policy of nationalization, or even the fact that the Government initiated the said scheme, did not disqualify him from deciding the dispute unless it was established that he was guilty of personal bias, and that there was no legal proof establishing the said fact.

At this stage, it would be convenient to notice briefly the decisions cited at the Bar disclosing the relevant principles governing the "doctrine of bias". The principles governing the "doctrine of bias" *vis-a-vis* judicial tribunals are well-settled and they are : (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal" ; and that "any direct pecuniary interest however small, in the subject-matter of inquiry will disqualify a Judge, and any interest though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias". The said principles are equally applicable to authorities, though they are not Courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others, *i.e.*, authorities who are empowered to discharge quasi-judicial functions. The said principles are accepted by the learned counsel on both sides; but the question raised in this case is whether,

1. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : A.I.R. 1959 S.C. 308.

when a statute confers a power on an authority and imposes a duty on it to be a judge of its own cause or to decide a dispute in which it has an official bias, the doctrine of bias is qualified to the extent of the statutory authorization. In *Rex* v. *Bath Compensation Authority*[1], the licensing justices of a county borough referred the application for the renewal of the licence of a hotel to the compensation authority of the borough and also resolved that a solicitor should be instructed to appear before the compensation authority and oppose the renewal of the licence on their behalf. The solicitor so instructed appeared before the authority and supported the opposition, and in the result the compensation authority refused the renewal subject to payment of compensation. It may be mentioned that a majority of the justices who sat on the compensation tribunal and voted against the renewal of the licence had as members of the licensing committee been parties to the resolution referring the question of renewal to the compensation authority. The Court of Appeal by a majority, Atkin, L.J., dissenting, held that in view of the provisions of the Licensing Act, 1910, the facts in that case did not disclose such bias or likelihood of bias as would disqualify them from sitting on the tribunal. This decision was reversed by the House of Lords on appeal (reported in L.R. 1926 A.C. 586). The House of Lords held that the decision of the tribunal, whereon three justices who referred the matter to the said authority sat, must be set aside on the ground that no one can both be a party and a judge in the same cause. Viscount Cave, L.C., meets the argument based upon the statutory duty thus, at page 592 :

" No doubt the statute contemplates the possibility of the licensing justices appearing before the compensation authority and taking part in the argument ; for it is provided by section 19, sub-section (2), that the compensation authority shall give any person appearing to them to be interested in the question of the renewal of a licence, " including the licensing justices ", an opportunity of being heard. But the statute nowhere says that justices who elect to appear as opponents of the renewal and take active steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as judges in the dispute; and in the absence of a clear provision to that effect I think that the ordinary rule, that no one can be both party and judge in the same cause, holds good."

This decision, therefore, is an authority for the proposition that, unless the legislature clearly and expressly ordained to the contrary, the principles of natural justice cannot be violated. In *Rex* v. *Leicester Justices*[2], a case also arising under the Licensing (Consolidation) Act, 1910, the King's Bench Division held that the mere fact that the licensing justice has originated an objection to the renewal of a licence does not disqualify him by reason of interest from sitting and adjudicating as a member of that authority upon, the matter of that licence. Salter, J., brought out the distinction between the *Rex* v. *Bath Compensation Authority's Case*[1], and the case before him in the following terms, at page 565 :

"The distinction is that, in that case, Parliament had not sanctioned what was done ; in this case, it has."

Dealing with the argument that there was some risk of bias if the statutory duty was discharged, the learned Judge rejected it with the observation that " some risk of bias is inseparable from the machinery which Parliament has set up ". At first sight this judgment appears to be inconsistent with the decision of the House of Lords in *Rex* v. *Bath Compensation Authority's Case*[1], but a scrutiny of the latter case shows that in that case the licensing justices had themselves actively opposed the renewal of the licence before the compensation authority and instructed a solicitor to do so on their behalf. This is not a duty cast on them by the statute whereas the licensing justices in dealing with an application for renewal of a licence and, when the question of renewal was referred for decision to the compensation authority, in sitting as members of that authority are merely carrying out the duties in accordance with the procedure prescribed by the Legislature. These decisions show that in England a statutory invasion of the common law objection on the ground of bias is tolerated by decisions, but the invasion is confined strictly to the limits of the statutory exception. It is not out of place here to notice that in England the Parliament is supreme and therefore a statutory law, however repugnant to the principles of natural justice, is valid ; whereas in India the law made by Parliament or a State

1. L.R. (1925) 1 K.B. 685. 2. L.R. (1927) 1 K.B. 557.

Legislature should stand the test of fundamental rights declared in Part III of the Constitution.

In the instant case the relevant provisions of the Act do not sanction any dereliction of the principles of natural justice. Under the Act a statutory authority, called the Transport Undertaking, is created and specified statutory functions are conferred on it. The said Undertaking prepares a scheme providing for road transport service in relation to an area to be run or operated by the said Undertaking. Any person affected by the scheme is required to file objections before the State Government, and the State Government, after receiving the objections and representations, gives a personal hearing to the objectors as well as to the Undertaking and approves or modifies the scheme as the case may be. The provisions of the Act, therefore, do not authorize the Government to initiate the scheme and thereafter constitute itself a judge in its own cause. The entire scheme of the Act visualizes, in case of conflict between the Undertaking and the operators of private buses, that the State Government should sit in judgment and resolve the conflict. The Act, therefore, does not authorize the State Government to act in derogation of the principles of natural justice.

The next question is whether the State Government, in the present case, acted in violation of the said principles. The argument that as this Court held in the previous stage of this litigation that the hearing given by the Secretary in charge of the Transport Department offended the principles of natural justice we should hold, as a logical corollary to the same, that the same infirmity would attach to the Chief Minister. This argument has to be rejected on two grounds : firstly, for the reason that on the last occasion the appellants did not question the right of the Chief Minister to decide on the objections to the scheme,—and indeed they assumed his undoubted right to do so—but canvassed the validity of his order on the basis that the Secretary, who was part of the Transport Department, gave the hearing and not the Chief Minister, and, therefore, a party to the dispute was made a judge of his own cause. If, as it is now contended, on the same reasoning the Chief Minister also would be disqualified from deciding the dispute, that point should have been raised at that stage : instead, a distinction was made between the Secretary of a Department and the Chief Minister, and the validity of the order of the Chief Minister was questioned on the basis of this distinction. This Court accepted that argument. Having obtained the judgment of this Court on that basis, it would not be open to the appellants, at this stage, to reopen the closed controversy and take a contrary position. That apart, there are no merits in this contention. There is clear distinction between the position of a Secretary of the Department and the Chief Minister of the State. Under the Constitution, the Governor is directed to act on the advice of the Ministers headed by the Chief Minister. In exercise of powers conferred by clauses (2) and (3) of Article 166 of the Constitution, the Governor of Madras made rules styled as "The Madras Government Business Rules and Secretariat Instructions", and rule 9 thereof prescribes that without prejudice to the provisions of rule 7, the Minister in charge of a department shall be primarily responsible for the disposal of the business pertaining to that department. The Governor of Andhra, in exercise of the powers under the Constitution, directed that until other provisions are made in this regard the business of the Government of Andhra shall be transacted in accordance with the said Rules. It is, therefore, manifest that under the Constitution and the Rules framed thereunder a Minister in charge of a department is primarily responsible for the disposal of the business pertaining to that department, but the ultimate responsibility for the advice is on the entire Ministry. But the position of the Secretary of a department is different. Under the said Rules, the Secretary of a department is its head, *i.e.*, he is part of the department. There is an essential distinction between the functions of a Secretary and a Minister ; the former is a part of the department and the latter is only primarily responsible for the disposal of the business pertaining to that department. On this distinction the previous judgment of this Court was based, for in that case, after pointing out the position of the Secretary in that Department, it was held that

"though the formal orders were made by the Chief Minister, in effect and substance, the enquiry was conducted and personal hearing was given by one of the parties to the dispute itself.'"

We cannot, therefore, accept the argument of the learned counsel that the Chief Minister is part of the department constituted as a statutory Undertaking under the Act.

The next question is whether the Chief Minister by his acts and speeches disqualified himself to act for the State Government in deciding the dispute. In the affidavit filed by Nageswara Rao, one of the appellants herein, in respect of the writ petitions filed in the High Court, he states in ground (8) of paragraph 14 thus :

"He (the Chief Minister) is the Minister in charge of the Transport Department at whose instance the Scheme was first published under section 68-C of the Act. He is not only the initiator of the Scheme but also the person who is interested in its approval and implementation. He has thus a direct and specific connection with the dispute being a party thereto and he would be acting as a judge in his own cause when he gives a personal hearing and considers the objections."

Mr. Chatterjee contends that this allegation embodied in ground (8) has not been contradicted by the respondents. It is not correct to say that these allegations went unchallenged, for in paragraph 6 of the counter-affidavit filed on behalf of the State, we find the following statements :

"The contentions of the petitioner in paragraph 14 of his affidavit are without substance. The scheme as approved by the Government is neither illegal nor without jurisdiction."

In sub-paragraph (3) of paragraph 6, it is alleged :

"The allegation that the hearing and determination of the questions in issue are not in accordance with law or principles of judicial procedure, but only a farce gone through to satisfy the direction of the Supreme Court, is not correct."

Sub-paragraph (7) of paragraph 6 reads:

"The Minister in charge, *i.e.*, the Chief Minister can hear and decide. The State Government itself cannot be regarded as interested in the cause and therefore disqualified to decide."

Sub-paragraph (8) of the said paragraph says :

"The contention that the Chief Minister is not competent to give the hearing and consider the objections inasmuch as he is biassed and has also prejudged the issue, is not well-founded. On facts on 9th December, 1958, there was no Road Transport Department at all but a Road Transport Corporation, which is a completely autonomous body, with which the Chief Minister has no concern. Hence on the date of the enquiry, the Corporation being a completely autonomous body is an entirely independent body altogether and hence there can be no question of bias to the Chief Minister hearing the objectors. The hearing given by the Chief Minister is just like a hearing of the Court of law after remand by a Superior Court..................The allegation that the Chief Minister had closed his mind and was biased is absolutely baseless. He kept an open mind and considered all the objections fully."

The counter-affidavit further gives in detail how the scheme was initiated by Guru Pershad and how the various steps were taken in compliance with the provisions of the Act. It is therefore clear that the Government did not accept the allegations made by the appellants in their affidavits. Whatever may be the policy of the Government in the matter of nationalization of bus transport, it cannot be said that the Chief Minister initiated the scheme in question. The learned counsel then relied upon certain extracts from the reports published in the newspapers purporting to be the speeches of the Chief Minister. Exhibit IV is said to be a summary of the speech of the Chief Minister made on October 14, 1957, and the relevant portion thereof reads :

"I do not have any prejudice against the Krishna District. The bus transport in Telangana was nationalised 25 years ago. The Bus Transport Nationalisation was extended to Krishna District since it is contiguous to Telangana in regard to transport services. It will be extended to the other districts gradually. It requires 12 crores of rupees to introduce nationalisation in all the districts at the same time. The Government is aware that Nationalisation of Bus Transport is not profitable. But we should fall in line with other States and move with the times. There are 360 buses in Krishna District. I cannot give an assurance that all these would be taken over. It is regrettable that these should be subjected to severe criticism when they are being done in public interest."

This speech only reflects the policy of the Government. Exhibit V is said to be an extract from the report of the "Indian Express", dated October 18, 1957. The material part of it runs thus :

"Nationalisation of road transport services in the Andhra area was a settled fact and there was absolutely no question of going back on it............"

This speech also only states the policy of the Government and has no reference to Krishna District or to the transport services in that district. Exhibit VI is an extract from the report in "The Hindu" dated October 25, 1957, wherein it is alleged that the Chief Minister made the following statement:

"Mr. N. Sanjiva Reddy, Chief Minister, said here to-day that the nationalised road transport in Krishna would be administered by a Corporation.

The Chief Minister, who was addressing a press conference said: 'There is no question of postponement of the decision to nationalise bus transport in that district'. ....The Chief Minister said firmly that there was no public support to the contention of the private bus operators that there should be no nationalisation."

This speech has a direct reference to the nationalization of bus transport in Krishna District and indicates a firm determination on the part of the Chief Minister not to postpone it any further. Exhibit IX is an extract from the report in the "Indian Express" dated December 13, 1957, and it reads:

"The Andhra Pradesh Chief Minister Sanjiva Reddy told pressmen here to-day that the State Government would go ahead with the implementation of its decision to extend nationalisation of bus transport to Krishna district from April 1 next."

This also indicates the Chief Minister's determination to implement the scheme of nationalization of bus transport in Krishna District from a particular date. Exhibit X is a report in 'The Mail' under the date April 1, 1958, purporting to be a speech made by the Chief Minister in inaugurating the first phase of the extension of the nationalised road transport services to Guntur and Krishna Districts by the State Road Transport Corporation. Relevant extracts of the speech read thus:

"He (the Chief Minister) considered the implementation of the scheme simple first, but he regretted to find it difficult since bus operators filed writ petitions in the High Court, raised a 'huge noise' and fought till the very end against the scheme and finally even approached the Congress President Mr. U. N. Dhebar to save them........................

Mr. Sanjiva Reddy affirmed that the Government was determined to implement the scheme of nationalization of bus transport services against all opposition and persons like him trained by the late T. Prakasam were never afraid of opposition."

If it had been established that the Chief Minister made the speeches extracted in Exhibits VI, IX and X, there would have been considerable force in the argument of the learned counsel for the appellants; but no attempt was made to prove that the Chief Minister did in fact make those speeches. It is true that the extracts from the newspapers were filed before the Chief Minister and they were received subject to proof; but no person who heard the Chief Minister making those speeches filed an affidavit before him. The Chief Minister did not admit that he made the statements attributed to him. The Chief Minister in his order approving the scheme says:

"As regards the paper cuttings, I may mention that in the course of a long and varied political career I have made hundreds of statements on many an occasion and many of them may be purely personal opinions. Moreover, it is not always that the press people consult the persons on the accuracy of the statements made before they are published. The press cuttings filed before me are not communiques issued by the Government, with the approval of the Government. They are published records of several statements said to have been made by me on various occasions. It is common knowledge press cuttings here and there, torn out of context, will give a completely twisted picture and version of a man's real intentions. It is not possible for me to state anything definite about the veracity of these statements said to have been made by me at different points of time. It is quite possible that I might have made many such, on many an occasion, and it is also quite possible, that some points spoken here and there may have been published with headlines in the papers. It is not possible nor desirable to treat paper cuttings of statements said to have been made on several occasions as legal evidence in the judicial enquiry."

Notwithstanding the fact that the Chief Minister did not accept the correctness of the statements attributed to him in the newspapers, no attempt was made by the appellants to file any affidavit in the High Court sworn to by persons who had attended the meetings addressed by the Chief Minister and heard him making the said statements. In the circumstances, it must be held that it has not been established by the appellants that the Chief Minister made the speeches indicating his closed

mind on the subject of nationalisation of bus transport in Krishna District. If these newspaper cuttings are excluded from evidence, the factual basis for the appellants' argument disappears. We, therefore, hold that the Chief Minister was not disqualified to hear the objections against the scheme of nationalisation.

A subsidiary argument is raised on the basis of rule 11 of the Andhra Pradesh Motor Vehicles Rules. It is contended that the Road Transport Authority made an order rendering the permits of the appellants ineffective without giving them due notice as required by that rule and therefore the said order was invalid. Rule 11 of the said Rules reads :

" In giving effect to the approved scheme, the Regional Transport Authority or Authorities concerned shall, before eliminating the existing services or cancelling any, existing permit or modifying the conditions of the existing permit so as to—

(i) render the permit inffective beyond a specified date ;

(ii) reduce the number of vehicles authorised to be used under a permit ; or

(iii) curtail the area or route covered by the permit in so far as such permit relates to the notified route :

" Give due notice to the persons likely to be affected in the manner prescribed in these rules."

This rule will have to be read along with section 68-F, sub-section (2), which reads :

" For the purpose of giving effect to the approved scheme in respect of a notified area or notified route, the Regional Transport Authority may, by order,—

(a) refuse to entertain any application for the renewal of any other permit ;

(b) cancel any existing permit ;

(c) modify the terms of any existing permit so as to—

(i) render the permit ineffective beyond a specified date ;

(ii) reduce the number of vehicles authorised to be used under the permit ;

(iii) curtail the area or route covered by the permit in so far as such permit relates to the notified area or notified route."

A combined reading of section 68-F (2) and rule 11 makes it clear that the order contemplated under the said sub-section can be made by the Regional Transport Authority only after giving due notice to the persons likely to be affected by the said order. On December 24, 1958, the Regional Transport Authority made the following order :

" The permits of the following buses are rendered ineffective beyond 24th December, 1958, under section 68-F (2) (c) (i) of Motor Vehicles Act, 1939 (as amended by Act C of 1956) for the purpose of giving effect to the approved scheme of nationalisation in respect of the following notified routes."

The routes on which the appellants were operating their buses were also included in the routes mentioned in the order. On December 24, 1958, the Regional Transport Authority issued an order to the operators directing them to stop plying their buses on their respective routes from December 25, 1958, and that order was served on the appellants on the same day, *i.e.*, December 24, 1958. Though the learned Advocate-General suggested that the provisions of rule 11 have been satisfied in the present case, we find it impossible to accede to his contention. There are two defects in the procedure followed by the Regional Transport Authority: (i) while the rule enjoins on the Authority to issue notice to the persons affected before making the relevant order, the Authority made the order and communicated the same to the persons affected ; and (ii) while the rule requires due notice, *i.e.*, reasonable notice, to be given to the persons affected to enable them to make representations against the order proposed to be passed, the Regional Transport Authority gave them only a day for complying with that order, which in the circumstances could not be considered to be due notice within the meaning of the rule. We have, therefore, no hesitation to hold that the Regional Transport Authority did not strictly comply with the provisions of the rule. But, in view of the supervening circumstances, the High Court, while noticing this defect in the procedure followed by the

Regional Transport Authority, refused to exercise its jurisdiction under Article 226 of the Constitution. Pursuant to the order of the Regional Transport Authority the appellants withdrew their vehicles from the concerned routes and the vehicles of the Road Transport Corporation have been plying on those routes. The judgment of this Court conclusively decided all the questions raised in favour of the respondents, and if the order of the Regional Transport Authority was set aside and the appellants were given another opportunity to make their representations to that Authority, it would be, as the High Court says, only an empty formality. As their vehicles have already been withdrawn from the routes and replaced by the vehicles of the Corporation, the effect of any such order would not only (not *sic*) be of any help to the appellants but would introduce unnecessary complication and avoidable confusion. In the circumstances, it appears to us that, as the appellants, have failed all along the line, to interfere on a technical point of no practical utility is " to strain at a gnat after swallowing a camel ". We cannot, therefore, say that the High Court did not rightly exercise its discretion in this matter. The appeals fail and, in the circumstances, are dismissed without costs.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM AND K. N. WANCHOO, JJ.

Vishwanath .. *Appellant.**

v.

The State of Uttar Pradesh .. *Respondent.*

Penal Code (XLV of 1860), *sections* 97 *to* 100—*Right of private defence—Extent—When extends to causing death.*

When the accused's sister was being abducted, even though by her husband, and there was an assault on her and she was compelled by force to go away from her father's place, the accused would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

Considering that the accused had given only one blow with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. *Emperor* v. *Ram Saiya*, I.L.R. (1948) All. 165, overruled.

Appeal by Special Leave from the Judgment and Order, dated the 26th April, 1957, of the Allahabad High Court in Criminal Appeal No. 992 of 1954, arising out of the Judgment and Order, dated the 25th January, 1954, of the Additional Sessions Judge, Gorakhpur, in Sessions Trial No. 71 of 1953.

S. P. Sinha, Senior Advocate (*S. D. Sekhri*, Advocate, with him), for Appellant.

G. C. Mathur and *C. P. Lal*, Advocate for *G. N. Dikshit*, Advocate, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Allahabad High Court in a criminal matter. The facts of the case, as found by the High Court, are no longer in dispute and the question that is raised in this appeal is whether the appellant had exceeded the right of private defence of person. The relevant facts for our purposes are these. Gopal deceased was married to the sister of the appellant. The appellant and his father Badri were living in a railway quarter at Gorakhpur. Gopal's sister was married to one Banarsi, who was also living in another railway quarter nearby. Gopal had been living for some time with his father-in-law. They did not, however, pull on well together and Gopal shifted to the house of Banarsi. Badri persuaded Gopal to come back to his house but the relations remained strained and eventually Gopal shifted again to the quarter of Banarsi about 15 days before the present occurrence which took place on 11th June, 1953, at about 10 P.M. Gopal's wife had continued to live with her

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* Criminal Appeal No. 32 of 1958. 3rd September, 1959.

father as she was unwilling to go with Gopal. Her father Badri and her brother Vishwanath appellant sided with her and refused to let her go with Gopal. Gopal also suspected that she had been carrying on with one Moti who used to visit Badri's quarter. Consequently, Gopal was keen to take away his wife, the more so as he had got a job in the lace department some months before and wanted to lead an independent life. On 11th June, there was some quarrel between the appellant and Gopal about the girl; but nothing untoward happened then and the appellant went back to his quarter and Gopal went away to Banarsi's quarter. Gopal asked Banarsi's sons to help in bringing back his wife. Banarsi also arrived and then all four of them went to Badri's quarter to bring back the girl. On reaching the place, Banarsi and his two sons stood outside while Gopal went in. In the meantime, Badri came out and was asked by Banarsi to let the girl go with her husband. Badri was not agreeable to it and asked Banarsi not to interfere in other people's affairs. While Badri and Banarsi were talking, Gopal came out of the quarter dragging his reluctant wife behind him. The girl caught hold of the door as she was being taken out and a tug-of-war followed between her and Gopal. The appellant was also there and shouted to his father that Gopal was adamant. Badri thereupon replied that if Gopal was adamant, he should be beaten (*to maro*). On this the appellant took out a knife from his pocket and stabbed Gopal once. The knife penetrated into the heart and Gopal fell down senseless. Steps were taken to revive Gopal but without success. Thereupon Gopal was taken to the hospital by Badri and the appellant and Banarsi and his sons and some others but Gopal died by the time they reached the hospital.

On these facts the Sessions Judge was of opinion that Badri who had merely asked the appellant to beat Gopal could not have realised that the appellant would take out a knife from his pocket and stab Gopal. Badri was, therefore, acquitted of abetment. The Sessions Judge was further of opinion that the appellant had the right of private defence of person and that this right extended even to the causing of death as it arose on account of an assault on his sister which was with intent to abduct her. He was further of opinion that more harm than the circumstances of the case required was not caused; and therefore the appellant was also acquitted.

The State then appealed to the High Court against the acquittal of both accused. The High Court upheld the acquittal of Badri. The acquittal of the appellant was set aside on the ground that the case was not covered by the fifth clause of section 100 and that the right of private defence of person in this case did not extend to the voluntary causing of death to the assailant and therefore it was exceeded. The High Court relied on an earlier decision of its own in *Emperor* v. *Ram Saiya*[1]. The appellant was therefore convicted under section 304, Part II of the Penal Code and sentenced to three years' rigorous imprisonment. He applied for a certificate to enable him to appeal to this Court but this was refused. Thereupon he applied to this Court for Special Leave which was granted; and that is how the matter has come up before us

The main question therefore that falls for consideration in this appeal is whether the decision in *Ram Saiya's case*[1] is correct. It appears that four other High Courts have taken a view which is different from that taken in *Ram Saiya's case*[1], namely, *Jagat Singh* v *King-Emperor*[2], *Daroga Lohar* v *Emperor*[3], *Sakhu* v. *The State*[4] and *Dayaram Laxman* v. *State*[5]. There is, however, no discussion of the point in these four cases and we need not refer to them further. The view taken in *Ram Saiya's case*[1] is that the word "abducting" used in the fifth clause of section 100 of the Penal Code refers to such abducting as is an offence under that Code and not merely to the act of abduction as defined in section 362 thereof. Mere abduction is not an offence and, therefore, cannot give rise to any right of private defence and the extended right of private defence given by section 100 only arises if the offence which occasions the exercise of the right is of one of the kinds mentioned in section 100.

1. I.L.R. (1948) All. 165.
2. A.I.R. 1923 Lah. 155.
3. A.I.R. 1930 Pat. 347.
4. A.I.R. 1951 Nag. 349.
5. A.I.R. 1953 Madh. B. 182.

Section 97 gives the right of private defence of person against any offence affecting the human body. Section 99 lays down that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 with which we are concerned is in these terms:—

"The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right to be of any of the descriptions hereinafter enumerated, namely—

"*First*—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the conesqence of such assault;

Thirdly—An assault with the intention of committing rape;

Fourthly—An assault with the intention of gratifying unnatural lust;

Fifthly—An assault with the intention of kidnapping or abducting;

Sixthly—An assault with the intention of wrongfully confining a person under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

The right of private defence of person only arises if there is an offence affecting the human body. Offences affecting the human body are to be found in Chapter XVI from section 299 to section 377 of the Penal Code and include offences in the nature of use of criminal force and assault. Abduction is also in Chapter XVI and is defined in section 362. Abduction takes place whenever a person by force compels or by any deceitful means induces another person to go from any place. But abduction pure and simple is not an offence under the Penal Code. Only abduction with certain intent is punishable as an offence. If the intention is that the person abducted may be murdered or so disposed of as to be put in danger of being murdered, section 364 applies. If the intention is to cause secret and wrongful confinement, section 365 applies. If the abducted person is a woman and the intention is that she may be compelled or is likely to be compelled to marry any person against her will or may be forced or seduced to illicit intercourse or is likely to be so forced or seduced, section 366 applies. If the intention is to cause greivous hurt or so dispose of the person abducted as to puthim in danger of being subjected to grievous hurt, or slavery or to the unnatural lust of any person, section 367 applies. If the abducted person is a child under the age of ten and the intention is to take dishonestly any movable property from its person, section 369 applies. It is said that unless an offence under one of these sections is likely to be committed, the fifth clause of section 100 can have no application. On a plain reading, however, of that clause there does not seem to be any reason for holding that the word "abducting" used there means anything more than what is defined as "abduction" in section 362. It is true that the right of private defence of person arises only if an offence against the human body is committed. Section 100 gives an extended right of private defence of person in cases where the offence which occasions the exercise of the right is of any of the descriptions enumerated therein. Each of the six clauses of section 100 talks of an assault and assault is an offence against the human body: (*see* section 352). So before the extended right under section 100 arises there has to be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. The view in *Ram Saiya's case*[1] seems to overlook that in each of the six clauses enumerated in section 100, there is an offence against the human body, namely, assault. So the right of private defence arises against the offence, and what section 100 lays down is that if the assault is of an aggravated nature, as enumerated in that section, the right of private defence extends even to the causing of death. The fact that when describing the nature of the assault some of the clauses in section 100 use words which are themselves offences, as, for example, "grievous hurt", "rape", "kidnapping", "wrongfully confining", does not mean that the intention with which the assault is committed must always

1. I.L.R. (1948) All. 165.

be an offence in itself. In some other clauses, the words used to indicate the intention do not themselves amount to an offence under the Penal Code. For example, the first clause says that the assault must be such as may reasonably cause the apprehension of death. Now death is not an offence anywhere in the Penal Code. Therefore, when the word " abducting " is used in the fifth clause, that word by itself need not be an offence in order that that clause may be taken advantage of by or on behalf of a person who is assaulted with intent to abduct. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

Further the definition of " abduction " is in two parts, namely, (i) abduction where a person is compelled by force to go from any place and (ii) abduction where a person is induced by any deceitful means to go from any place. Now the fifth clause of section 100 contemplates only that kind of abduction in which force is used and where the assault is with the intention of abducting, the right of private defence that arises by reason of such assault extends even up to the causing of death. It would in our opinion be not right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in one of the sections of the Penal Code quoted above, before he takes steps to defend himself, even to the extent of causing death of the person abducting. The framers of the Code knew that abduction by itself was not an offence unless there was some further intention coupled with it. Even so in the fifth clause of section 100 the word "abducting" has been used without any further qualification to the effect that the abducting must be of the kind mentioned in section 364 onwards. We are therefore of opinion that the view taken in *Ram Saiya's case*[1] is not correct and the fifth clause must be given full effect according to its plain meaning. Therefore, when the appellant's sister was being abducted, even though by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place, the appellant would have the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right would extend to the causing of death.

The next question is whether the appellant was within the restrictions prescribed by section 99. It was urged that the right of private defence never extends to the inflicting of more harm than what is necessary for the purpose of defending and that in this case the appellant inflicted more harm than was necessary. We are of opinion that this is not so. The appellant gave only one blow with a knife which he happened to have in his pocket. It is unfortunate that the blow landed right into the heart and therefore Gopal died. But considering that the appellant had given only one blow with an ordinary knife which, if it had been a little this way or that, could not have been fatal, it cannot be said that he inflicted more harm than was necessary for the purpose of defence. As has been pointed out in *Amjad Khan* v. *The State*[2], " these things cannot be weighed in too fine a set of scales or ' in golden scale ' ".

We, therefore, allow the appeal and hold that the appellant had the right of private defence of person under the fifth clause of section 100 and did not cause more harm than was necessary and acquit him.

Appeal allowed.

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1. I.L.R. (1948) All. 165.
2. (1952) S.C.J. 227 : (1952) 2 M.L.J. 97 : (1952) S.C.R. 567.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

The Manager, Hotel Imperial, New Delhi .. *Appellant**.

v.

The Chief Commissioner, Delhi and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 10—*Reference under—Validity—Essentials.*

Where the two parties to the dispute are clearly indicated, namely, (1) the employer which is the management of the hotel and (2) the workmen employed in the hotel, the reference is valid and it does not become incompetent simply because it is mentioned therein that the workmen will be represented by such and such Union in the dispute. Though the reference mentions the Union itself, such Union can be served through some officer, such as its president or secretary and it is that officer who will really represent the workmen before the Tribunal.

It is unnecessary for the purposes of section 10 of the Industrial Disputes Act where the dispute is of a general nature relating to the terms of employment or conditions of labour of a body of work. men, to mention the names of particular workmen who might have been responsible for the dispute. It is only when a dispute refers to dismissal, etc., of particular workmen as represented by the Union that it may be desirable to mention the names of the workmen concerned. (In the instant case names of workmen to whom notice of dismissal had been given were mentioned in the order of reference and the order of reference cannot be attacked as vague.)

Appeal from the Judgment and Order, dated the 25th November, 1955, of the Circuit Bench of the Punjab High Court at Delhi, in Civil Writ Application No. 189-D of 1955.

Jai Gopal Sethi, Senior Advocate (*J. B. Dadachanji, S. N. Andley, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Company*, with him), for Appellant.

R. H. Dhebar and *T. M. Sen*, Advocates, for Respondent No. 1.

G. S. Pathak, Senior Advocate (*V. P. Nayar* and *Janardan Sharma*, Advocates, with him), for Respondent No. 3.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal comes before us on a certificate granted by the Punjab High Court under Article 133 (1) (*a*) and (*c*) of the Constitution. The appellant is the Manager, Hotel Imperial, New Delhi (hereinafter called the hotel) while the respondents are the Chief Commissioner, Delhi, the Additional Industrial Tribunal, Delhi and the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi. The main contesting respondent is respondent No. 3 (hereinafter called the Union). A dispute arose between the hotel and its workmen in October, 1955. It was referred to an Industrial Tribunal on 12th October, 1955, by the Chief Commissioner of Delhi. The portion of the order of reference, relevant for our purposes, is in these terms—

"WHEREAS from a report submitted by the Director of Industries and Labour, Delhi, under section 12 (4) of the Industrial Disputes Act, 1947, as amended, it appears that an industrial dispute exists between the management of the Hotel Imperial, New Delhi and its workmen as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi ;

"AND WHEREAS on a consideration of the said report the Chief Commissioner, Delhi, is satisfied that the said dispute should be referred to a Tribunal."

Then follows the order referring the dispute to the Additional Industrial Tribunal, Delhi, including the terms of reference. Soon after the hotel filed a writ application in the Punjab High Court challenging the order of reference on a variety of grounds. The writ application was heard by the High Court and dismissed on 25th November, 1955. The hotel then applied for leave to appeal to this Court, which was granted on 13th January, 1956. The hotel obtained stay of the proceedings before the Additional Industrial Tribunal from this Court on 27th

* Civil Appeal No. 291 of 1956. 13th May, 1959.

February, 1956. That is how this dispute which would have been otherwise decided long ago is still in its initial stage.

The main contention on behalf of the hotel is that the reference is incompetent and two grounds have been urged in support of it, namely, (1) the Union could not be made a party to the reference under the Industrial Disputes Act, 1947, (hereinafter called the Act) ; and (2) the reference was vague, as it did not indicate how many of the 480 workers of thirty different categories working in the hotel were involved in the dispute. We are of opinion that there is no force in these grounds of attack. An " industrial dispute " for our purposes has been defined in section 2 (*k*) of the Act as meaning " any dispute or difference between employers and workmen. . . . . . which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person." Section 10 (1) of the Act gives power to the appropriate Government where it is of opinion that an industrial dispute exists or is apprehended to refer the dispute to a Tribunal for adjudication. It cannot be denied on the facts of this case that there was a dispute between the hotel and its workmen and it went to this length that the hotel decided to dismiss a large number of workmen on 7th October, 1955. It is also undoubted that the dispute was with respect to the terms of employment or conditions of labour of the workmen. The Chief Commissioner would therefore have power under section 10 (1) of the Act to make a reference of the dispute to a Tribunal for adjudication. The attack of the hotel is on the form in which the reference was made and the contention is that the reference in this form is incompetent. We have already set out the relevant part of the order of reference giving the form in which it was made. The two parties to the dispute are clearly indicated, namely, (1) the employer which is the management of the hotel and (2) the workmen employed in the hotel. The objection, however, is that the words " as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi " which appear in the order of reference make it incompetent, inasmuch as the Union could not be made a party to the reference. We are of opinion that this objection is a mere technicality, which does not affect the competence of the order of reference. The fact remains that the dispute which was referred for adjudication was between the employer, namely, the management of the hotel, and its employees, which were mentioned as its workmen. The addition of the words " as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi " was merely for the sake of convenience so that the Tribunal may know to whom it should give notice when proceeding to deal with the reference. That however did not preclude the workmen, if they wanted to be represented by any other Union, to apply to the Tribunal for such representation or even to apply for being made parties individually. Section 36 of the Act provides that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by (*a*) an officer of a Trade Union of which he is a member, or (*b*) an officer of a Federation of Trade Unions to which the Trade Union of which he is a member is affiliated; or (*c*) where the workman is not a member of any Trade Union, by an officer of any Trade Union connected with, or by any other workman employed in the industry in which the workman is employed. The fact therefore that in the order of reference the quoted words were added for the sake of convenience as to where the notice to the workmen should be sent would not in our opinion make the reference incompetent. The objection further is that even if the workman is entitled to be represented by an officer of a Trade Union of which he is a member, the reference in this case does not mention any officer of the Trade Union, but mentions the Union itself. This in our opinion is a technicality, upon technicality, for the Union not being a living person can only be served through some officer, such as its president or secretary and it is that officer who will really represent the workmen before the Tribunal. We are therefore of opinion that the reference which is otherwise valid does not become incompetent simply because it is mentioned therein that the workmen will be represented by such and such Union in the dispute. We may in this connection point out that the large majority of references under the Act which we have

come across are usually in this form and the reason for it is obvious, namely, the convenience of informing the tribunal to whom it should send a notice on behalf of the workmen, whose number is generally very large. We, therefore, reject the contention that the reference is bad simply because in the order of reference the words " as represented by the Hotel Workers' Union, Katra Shahanshahi, Chandni Chowk, Delhi " have been added.

Equally, we see no force in the other ground of attack, namely, that the reference is bad because it does not specify how many of the 480 workmen of thirty different categories were involved in the dispute. It is, in our opinion, unnecessary for the purposes of section 10 where the dispute is of a general nature relating to the terms of employment or conditions of labour of a body of workmen, to mention the names of particular workmen who might have been responsible for the dispute. It is only where a dispute refers to the dismissal, etc., of particular workmen as represented by the union that it may be desirable to mention the names of the workmen concerned. In this case, the dispute was also about workmen to whom notice of dismissal had been given and in that connection the names of the workmen concerned were mentioned in the order of reference. We may, in this connection, refer to *State of Madras* v. *C. P. Sarathy and another*[1], where a similar attack on the competence of a reference was made on the ground of vagueness. In that case, the reference was in these terms :

> " WHEREAS an industrial dispute has arisen between the workers and management of the cinema talkies in the Madras City in respect of certain matters :
>
> " AND WHEREAS in the opinion of His Excellency the Governor of Madras, it is necessary to refer the said industrial dispute for adjudication ;"

Thereafter followed the order of reference, which did not even contain the terms of reference. The order, however, indicated that

> " the Industrial Tribunal may, in its discretion, settle the issues in the light of a preliminary enquiry which it may hold for the purpose and thereafter adjudicate on the said industrial dispute."

The Commissioner of Labour was requested to send copies of the order to the managements of cinema talkies concerned. It was held there that

> " the reference to the Tribunal under section 10 (1) of the Industrial Disputes Act, 1947, cannot be held to be invalid merely because it did not specify the disputes or the parties between whom the disputes arose."

It was further held that

> " the Government must, of course, have sufficient knowledge of the nature of the dispute to be satisfied that it is an industrial dispute within the meaning of the Act, as, for instance, that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under section 10 (1) or to specify them in the order."

The present reference as compared to the reference in that case cannot be called vague at all. Here the parties to the dispute are clearly specified, namely, (i) the management of the hotel, and (ii) its workmen. The nature of the dispute is also specified in the terms of reference. It was, in our opinion, entirely unnecessary to mention in the order of reference as to who were the workmen who were responsible for the dispute. We are, therefore, of opinion that this attack on the ground of vagueness also fails. There is no force in this appeal and it is hereby dismissed with costs to respondents No. 3. In view of the fact that more than three years have passed since the reference was made, we trust that the Additional Industrial Tribunal will now dispose of the matter as expeditiously as it can.

Appeal dismissed.

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1. (1953) S.C.J. 39 : (1953) 1 M.L.J. 212 : (1953) S.C.R. 334.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, S. K. DAS, A. K. SARKAR, K. N. WANCHOO AND M. HIDAYATULLAH, JJ.

Rajah Velugoti Venkata Sesha Varada Rajagopala Krishna Yachendra Bahadur, Kumararajah, Venkatagiri .. *Appellant**

v.

The State of Andhra Pradesh and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 20—*Scope and effect —Mineral Concession Rules* (1949), *rule* 47—*Applicability and effect.*

The scheme of the Madras Estates (Abolition and Conversion into Ryotwari) Act, section 20, is to render ineffective all rights created after July 1, 1945, for a period exceeding one year. In one view of the matter it may well be taken as meaning that the creation of rights after July 1, 1945, is, by the force of the second proviso itself, void as against the Government without any further necessity for any overt act to be done by the Government to avoid the same. In that sense the second proviso would be a self-contained provision and the aid of the third proviso would be wholly uncalled for. But assuming that the effect of the second proviso is to make the rights created after July 1, 1945, only voidable and not void, all that follows is that the Government must do something to avoid them. There is no warrant for saying that the avoidance must be under the terms of the third proviso. If the third proviso at all applied to rights created after July 1, 1945, then the second proviso would be otiose and need not have been enacted at all. The third proviso deals with the termination of rights created before July 1, 1945. The second proviso makes rights created after July 1, 1945, unenforceable as against Government. The second proviso was enacted to nullify the creation of rights in anticipation of the impending legislation, and hence it was made unconditional. If any condition was intended to be super-imposed on the rights of the Government to terminate rights created after July 1, 1945, one would have expected those conditions to be mentioned in the second proviso itself. When a slate quarrying lease is determined under the second proviso the terms as to renewal implied under rule 47 of the Mineral Concession Rules must fall with the lease.

Appeals from the Judgment and Order, dated the 20th November, 1957, of the Andhra Pradesh High Court in Writ Petitions Nos. 1 of 1956, 19 and 470 of 1957[1].

A. V. Viswanatha Sastri, Senior Advocate (*V. Vedantachari* and *K. Sundararajan*, Advocates, with him), for Appellant.

H. N. Sanyal, Additional Solicitor-General of India, (*D. Venkatappiah Sastri* and *T. M. Sen*, Advocates, with him), for Respondent No. 1.

K. R. Chaudhuri, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Das, C.J.—These three appeals are directed against the judgment and order pronounced by a Bench of the Andhra Pradesh High Court on November 20, 1957[1], whereby three writ petitions, namely, No. 1 of 1956, No. 19 of 1957 and No. 470 of 1957, which had been filed by the appellant and were heard together, were dismissed with costs. These appeals have been filed with certificates granted by the High Court of Andhra Pradesh.

The circumstances under which the three writ petitions came to be filed by the appellant may now be narrated. It is alleged that on January 10, 1942, an agreement was entered into between the Rajah of Venkatagiri and one Sri Balumuri Nageswara Rao whereby the Rajah agreed to give annual leases in respect of certain slate quarries within his estate for five years in succession commencing from February, 1942, if the Rajah was satisfied with the work carried on by the lessee during the preceding year. It was further stipulated that if the leases were given continuously for five years, then the lessee would be entitled at the end of the fifth year to obtain a lease from the Rajah for a period of 20 years commencing from the termination of the fifth year. On the expiry of the fifth year, however, the Rajah

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* C.As. Nos. 188 to 190 of 1958. 14th August, 1959.

1. (1958) 1 An. W.R. 459.

granted another lease to the said Balumuri Nageswara Rao for a short period commencing from February 1, 1947, and ending on November 30, 1947. On December 10, 1947, the said Balumuri Nageswara Rao is said to have assigned his right, title and interest under the said agreement, dated January 10, 1942, to the appellant, one of the sons of the Rajah. The Rajah on the same day granted a lease for twenty years to the appellant. On September 7, 1949, the Venkatagiri estate was notified under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Mad. XXVI of 1948), hereinafter referred to as the Abolition Act. On the same date the appellant applied to the Collector for confirmation of the lease granted by the Rajah to him. Nothing appears to have happened until February 12, 1952, when a notice was issued from the office of the Board of Revenue (Andhra) calling upon the appellant to show cause within two months from the date of receipt of notice as to why the lease should not be terminated without any compensation under the second proviso to section 20 (1) of the Abolition Act. The appellant showed cause which apparently did not satisfy the said authorities. Instructions appear to have been issued to the manager of the Venkatagiri estate requiring him to take over possession of the slate quarries which were then being worked by the appellant immediately after the expiry of two months notice issued to him. The appellant promptly filed a Writ Petition No. 287 of 1952 in the Madras High Court praying for the issue of a writ in the nature of a writ of *mandamus* directing the Madras State to forbear from terminating the leasehold right of the petitioner in the slate quarries and from interfering with his possession and working of the slate quarries and other ancillary reliefs. The writ petition having come up for hearing before Umamaheswaram, J., the learned Judge on July 18, 1955, made an order directing the Government to hold an enquiry under section 20 of the Abolition Act and decide whether the lease had been granted prior or subsequent to July 1, 1945. The order required the Government to hold the enquiry and pass the appropriate orders within three months from the date of that order. The Board of Revenue caused an enquiry to be made by the Director of Settlements who, after taking evidence, oral and documentary, made his report to the Board of Revenue. The Board of Revenue submitted a report to the Government on October 20, 1955, and the Government after considering the Board's report instructed the latter to dispose of the case on merits. Thereupon the Board of Revenue passed an order on December 27, 1955, declaring that the lease to the appellant had been granted subsequent to July 1, 1945, and that, as the lease was for a period exceeding one year, it was not enforceable against the Government, according to the second proviso to section 20 (1) of the Abolition Act. On that finding the Board of Revenue declined to ratify the lease and terminated it under the powers delegated to it under the Rules framed under the Abolition Act. The Board of Revenue also directed the Collector to take possesssion of the slate quarries from the appellant. The appellant promptly filed Writ Petition No.1 of 1956 praying for the issue of a writ of *mandamus* directing the State of Andhra Pradesh to forbear from terminating his leasehold right in the slate quarries. He filed another petition, being Writ Petition No. 19 of 1957, for the issue of a writ of *certiorari* to quash the order made by the Board of Revenue on December 27, 1955.

In the meantime on September 21, 1955, the appellant had applied to the Board of Revenue, Andhra, for renewal of the lease under rule 47 of the Mineral Concession Rules, 1949. That application was dismissed on May 23, 1957. The appellant thereupon filed a Writ Petition No. 470 of 1957 for quashing the last mentioned order passed by the Board of Revenue, or, in the alternative, for the issue of a writ of *mandamus* directing the State of Andhra Pradesh to issue a fresh lease in accordance with rule 47 of the Mineral Concession Rules, 1949. All these writ petitions were heard together and were disposed of by a common judgment against which these appeals have been filed.

The principal question canvassed before us is that the termination of the appellant's lease by the order, dated December 27, 1955, was bad as it did not give three months' notice to the appellant or provide for any compensation as

required by section 20 of the Abolition Act. The answer to the question depends on a true construction of that section which runs thus :—

"20. *Saving of rights of certain lessees and others.*—(1) In cases not governed by sections 18 and 19, where before the notified date, a landholder has created any right in any land (whether by way of lease or otherwise) including rights in any forest, mines or minerals, quarries, fisheries or ferries, the transaction shall be deemed to be valid ; and all rights and obligations arising thereunder, on or after the notified date, shall be enforceable by or against the Government :

Provided that the transaction was not void or illegal under any law in force at the time :

Provided further that any such right created on or after the 1st day of July, 1945, shall not be enforceable against the Government, unless it was created for a period not exceeding one year :

Provided also that where such right was created for a period exceeding one year, unless it relates to the private land of the landholder within the meaning of section 3, clause (10), of the Estates Land Act, the Government may, if, in their opinion, it is in the public interest to do so, by notice given to the person conerned, terminate the right with effect from such date as may be specified in the notice, not being earlier than three months from the date thereof.

(2) The person, whose right has been terminated by the Government under the foregoing proviso, shall be entitled to compensation from the Government which shall be determined by the Board of Revenue in such manner as may be prescribed, having reagard to the value of the right and the unexpired portion of the period for which the right was created. The decision of the Board of Revenue shall be final and not be liable to be questioned in any Court of Law."

The Long Title and the Preamble to the Abolition Act indicate, it is urged, that the object of the Act is to provide for the acquisition of the rights of landholders and that the policy of the Act is not to interfere with the rights of other persons in the estate. This assumption, however, is not borne out by the substantive provisions of the Act itself. Section 3 sets forth the consequences which ensue on the notification of an estate and it is clear that on an estate being notified the entire estate is to stand transferred to the Government and all rights and interests created in or over the estate before the notified date by the principal or any other landholder must, as against the Government, cease and determine.

We are next reminded that the Abolition Act was enacted when section 299 of the Government of India Act, 1935, was in force. Under that section no property could be acquired save for a public purpose and save by authority of a law which provides for compensation. The Abolition Act was enacted by the Madras Legislature in exercise of the legislative power conferred on it by the Government of India Act, 1935. According to learned counsel for the appellant, the Court must assume that the Madras Legislature acted properly and within the limits of the powers conferred on it. The Court must, therefore, interpret the provisions of the Abolition Act on the footing that it is a valid piece of legislation and that its provisions do not offend section 299 of the Government of India Act, 1935. The Abolition Act is a law for the compulsory acquisition of property and, therefore, the Court must put that interpretation on the relevant sections which will result in the payment of compensation to the person who is deprived of his property. It may be conceded that normally this is the correct approach to the problem, but the argument loses much of its force, when we advert to the provisions of Articles 31 (6) and 31-B of the Constitution of India read with the Ninth Schedule thereto. Those provisions proceed on the assumption that certain laws passed under the Government of India Act, 1935, did offend section 299 of that Act and expressly save those Acts. The Abolition Act is one of the Acts included in the Ninth Schedule and is protected by Article 31-B. In the circumstances, the Court must interpret the Abolition Act as it finds it by giving the ordinary and natural meaning to the words used by the Madras Legislature and uninfluenced by any pre-conceived notion as to validity of the Abolition Act.

Provision for payment of compensation for the determination of rights created before the notified date is provided in sub-section (2) of section 20 of the Abolition Act. Under that sub-section a person can claim compensation only when his right is terminated by the Government under "the foregoing proviso". The words "foregoing proviso", it is conceded, refer to the third proviso to sub-section (1). The endeavour of learned counsel for the appellant, therefore, is to induce us to hold that the termination of the appellant's leasehold rights which

were created on or after July 1, 1945, could only be done under the third proviso, for otherwise the provisions of sub-section (2) which provide for compensation will not be attracted. Action taken by the Government under the third proviso to sub-section (1) can be supported only if the conditions laid down in that proviso can be shown to have been complied with, namely, that the Government had formed the opinion that it was in the public interest to terminate such lease and that three months' notice had been given before such termination. The argument is that the second proviso is merely declaratory and the third proviso supplies the machinery for giving effect to the provisions of the second proviso. According to the argument the third proviso is not an independent proviso but is a sort of proviso to the second proviso. In other words, the third proviso, according to learned counsel for the appellant, merely enables the Government to exercise the right conferred on it by the second proviso and, therefore, the Government, if it intends to avail itself of the right under the second proviso, must comply with the conditions laid down in the third proviso. It is said that the words "such rights" in the third proviso relate to the rights mentioned in the second proviso, that is to say, rights created on or after July 1, 1945. The scheme of section 20 of the Abolition Act is said to be, to provide, firstly that rights created by way of lease or otherwise by the landholder prior to the notified date should be deemed to be valid and all rights and obligations arising thereunder on or after the notified date should be enforceable by or against the Government. We start with this broad proposition. Then we come to the provisos. We may omit the first proviso, for it has no application to the facts of this case. The implications of the second proviso, learned counsel for the appellant points out, are two-fold, namely, (*a*) that all rights created before the notified date but after July 1, 1945, for a period not exceeding one year would be valid and enforceable both by and against the Government by the operation of the body of sub-section (1) itself and (*b*) that rights created before the notified date but after July 1, 1945, for a period exceeding one year would also be valid and enforceable by the Government against the person in whose favour such right had been created by reason of section 20 (1). Then we have the express provision of the second proviso, namely, that rights created before the notified date but after July 1, 1945, for a period exceeding one year would not be enforceable against the Government. In other words, the true meaning of the second proviso is said to be that rights created after July 1, 1945, are only voidable at the instance of the Government and that that being the position, the Government must do some overt act to terminate the transaction. The machinery for such a termination, it is urged, is to be found in the third proviso and the conclusion is pressed upon us that such termination can be brought about only on the fulfilment of the conditions laid down in the third proviso. The final step in the argument is that the person whose rights are terminated under the third proviso which is the " foregoing proviso " referred to in sub-section (2) must, therefore, be entitled to compensation under sub-section (2). We are unable to accept this line of argument as correct.

The provision of section 20 of the Abolition Act has been considered and construed by a Bench of the Madras High Court. We may, with advantage, quote here a part of the views expressed by Venkatarama Ayyar, J., in delivering the judgment of that Bench in *A.M.S.S.V.M. & Co.* v. *The State of Madras*[1] :

" The argument of the petitioners is that the words " such rights " in the third proviso have reference to the rights created after the 1st July, 1945, mentioned in the previous proviso and on that construction, the lease in favour of the petitioners could be terminated only in accordance with that proviso by giving three months' notice. But this is to read the third proviso as a proviso not to the section, but to the second proviso and there is no warrant in law for such a construction. The words " such rights " refer in the second proviso only to the right dealt with in the body of the section and those words, occurring in the third proviso, should also bear the same interpretation. That the third proviso does not govern the second proviso is also clear if the scope of the two provisos is examined. Under the second proviso, leases for a period exceeding one year and created after 1st July, 1945, are not enforceable against the Government. That is to say, the Government can elect to disaffirm them and they become, on such disaffirmance, viod. If the third proviso also applies to such leases, as the petitioners contend, then the lease can be terminated only if the Government is satis-

1. (1953) 2 M.L.J. 587 : I.L.R. (1953) Mad. 1175, 1195.

fied that it is in the public interest that it should be terminated and that further, in such cases, the lessee will also be entitled to compensation under section 20 (2). In other words, while under the second proviso the Government can terminate the lease at its option and unconditionally, under proviso (iii) that can be done only if it is in public interest and, in that event, on payment of compensation, and this repugnancy can be avoided only by construing them as referring to different subjects. Then again, there is in proviso (iii) an exception with reference to rights created over private lands ; there is nothing corresponding to it in the second proviso and that also shows that the scope of the two provisos is different. The true effect of the section can be stated in three propositions : (i) Rights validly created prior to 1st July, 1945, will be valid ; (ii) such rights, however, may be determined under the third proviso if it is in the public interest to do so and in such cases, compensation will be payable under section 20 (2) ; and (iii) rights created after 1st July, 1945, if they are for a period exceeding one year, are liable to be avoided under the second proviso. In this view, we are of opinion that the notice, dated 13th March, 1951, falls under the second proviso and is valid."

It is pointed out that the attention of the Madras High Court was not drawn to the rule framed by the Governor of Madras in exercise of powers conferred on him by section 67 (1) and (2) of the Abolition Act. That rule runs as follows :

"Rule

In the case of any right in any land created by a landholder on or after the 1st day of July, 1945, for a period exceeding one year and falling under the second proviso to section 20 (1) of the said Act, the authority to decide whether the right should be terminated or allowed to continue shall be the Board of Revenue. Any order passed by the Board of Revenue under this rule shall be subject to revision by the Government."

We do not think that the rule in any way impairs the correctness of the Madras decision. It will be noticed that that rule only indicates the authority who is to decide whether the right falling under the second proviso should be terminated or allowed to continue. It does not purport to lay down the manner in which such termination is to be brought about. In other words, that rule does not, in terms, attract the operation of the third proviso at all. Even if that rule has the effect contended for, it cannot, in our view, change the meaning of section 20 which we gather on a true construction thereof.

In our view the scheme of the Act is to render ineffective all rights created after July 1, 1945, for a period exceeding one year. In one view of the matter it may well be taken as meaning that the creation of rights after July 1, 1945, is, by the force of the second proviso itself, void as against the Government without any further necessity for any overt act to be done by the Government to avoid the same. In that sense the second proviso would be a self-contained provision and the aid of the third proviso would be wholly uncalled for. But assuming that the effect of the second proviso is to make the rights created after July 1, 1945, only voidable and not void, all that follows is that the Government must do something to avoid them. There is no warrant for saying that the avoidance must be under the terms of the third proviso. If the third proviso at all applied to rights created after July 1, 1945, then the second proviso would be otiose and need not have been enacted at all. In our opinion the third proviso deals with the termination of rights created before July 1, 1945. The second proviso makes rights created after July 1, 1945, unenforceable as against the Government. The reason for conferment of such an unconditional right on the Government is well known, for it was on that crucial date that the party which came into power later declared its intention to abolish all zemindaries and intermediary interest in land. The second proviso was enacted to nullify the creation of rights in anticipation of the impending legislation and hence it was made unconditional. If any condition was intended to be super-imposed on the right of the Government to terminate the rights created after July 1, 1945, one would have expected those conditions to be mentioned in the second proviso itself. In our opinion, there is no substance in the principal point urged by learned counsel appearing for the appellant before us.

It was somewhat faintly argued by learned counsel for the appellant that the Government should have allowed the appellant's application for the renewal of his lease under rule 47 of the Mineral Concession Rules of 1949. The argument is wholly untenable. That rule provides that a mining lease granted by a private person shall be subject to certain conditions therein specified. The first condition thus laid down is that the term of the lease should be renewed at the option of the lessee for one period not exceeding the duration of the original lease. The effect of this rule is,

as it were, to insert statutorily some new terms in the lease itself. In other words, this rule does not do anything more than add some terms to the lease. When, however, the lease is determined under the second proviso, these terms must also fall with it.

No other point has been urged before us and, for reasons stated above, we think that these appeals should be dismissed with costs and we order accordingly.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, M. HIDAYATULLAH AND K. C. DAS GUPTA, JJ.

Radha Prasad Singh .. *Appellant**

v.

Gajadhar Singh and Others .. *Respondents.*

Practice—Appeal—Finding of fact by Trial Court—Interference by Appellate Court—Principles.

When an appeal lies on facts it is the right and the duty of the Appellate Court to consider what its decision on the question of facts should be ; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judges' conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an Appeal Court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court, that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary fact the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.

Appeal from the Judgment and Decree, dated the 8th April, 1949, of the Patna High Court, in Appeal from Original Decree No. 116 of 1947, arising out of the Judgment and Decree, dated the 28th February, 1947, of the Sub-Judge at Begusarai, in Title Suit No. 14/14 of 1944/45.

L. K. Jha, Senior Advocate, (*B. K. Sinha*, Advocate, with him), for Appellant.

G. S. Pathak and *B. Sen*, Senior Advocates, (*B. K. Saran* and *R. C. Prasad*, Advocates, with them), for Respondent No. 1.

S. D. Sekhri, Advocate, for Respondents Nos. 3 and 4.

The Judgment of the Court was delivered by

Das Gupta, J.—Though a number of questions, some of fact and some of law were originally raised in this suit for pre-emption, the main question for consideration in this appeal from the judgment of the High Court of Patna reversing the decree or pre-emption granted by the Trial Court, the Subordinate Judge of Monghyr, is the question on which the High Court based its decision of reversal. That question is whether the ceremonies essential for exercising the right of pre-emption were properly performed. Issue No. 9 in which this question was raised is in these words :—

" Did the plaintiff perform the ceremonies of Talab-E-Mowasibat and Talab-E-Ishtashad as required by law ? "

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* C.A. No. 19 of 1954. 7th September, 1959.

The plaintiff Radha Prasad Singh brought this suit for pre-emption in respect of 5 items of property described in Schedule B of the plaint which along with certain other properties were sold by the defendant 2nd Party Mst. Jogeshwari Kumari *alias* Jogeshwari Kumari widow of Babu Ganga Prasad Singh deceased and daughter of Babu Narsingh Prasad Singh by a deed executed on November 18, 1943, at Moghra and registered on November 23, 1943, at Monghyr.

The Trial Court held that the plaintiff had failed to prove that he was a co-sharer in respect of Item 2 of Schedule B. As regards the other 4 items of properties he held that the plaintiff was a co-sharer and as already indicated he gave the plaintiff a decree for pre-emption in respect of these 4 Items.

The sale-deed is in favour of the defendant first party, Gajadhar Singh. It is no longer disputed, however, that Gajadhar Singh was a mere benamidar and the real purchaser by this deed was Babu Lakshmi Prasad Singh, his son Satya Narain Singh and others.

A dispute was raised as to whether 4 annas 5 gandas odd share of Mauza, Majhaul Kilan Shri Ram was sold or the entire 8 annas odd share of the vendor was sold. It has been held by both the Courts below that the plaintiff's original case that the 4 annas 5 gandas odd share of Majhaul Kilan Shri Ram was sold is not correct and that really 8 annas odd share, the entire interest of the vendor in this property was sold by the deed, but that after the registration of the sale-deed it was tampered with and by an act of forgery the 8 annas odd share was altered fraudulently to 4 annas 5 gandas. It was after the defendant's pleading in the written-statement that 8 annas odd gandas of this Mauza was sold and not 4 annas odd gandas as mentioned in Schedule B, that the plaintiff prayed for and obtained an amendment of the plaint by which an alternative prayer for pre-emption in respect of 8 annas odd share of this Mauza was made. But for this amendment it is obvious the prayer for pre-emption could not be granted as being only for a partial pre-emption, once it has been found that 8 annas odd gandas were sold and not 4 annas odd gandas. One question which was therefore raised was whether the amendment was rightly granted by the Trial Court. The question that the suit as brought was for partial pre-emption was also raised from another aspect, *viz.*, that though the sale of this Mauza, Majhaul Kilan Shri Ram was of all villages Asli Mai Dakhili, *i.e.*, original with dependencies, there is no prayer for pre-emption in this suit in respect of Dakhili villages. As already indicated, however, the main question in controversy was whether the essential ceremonies required in law, *i.e.*, Talab-E-Mowashibat and Talab-E-Ishtshad were performed in accordance with law.

As regards this the plaintiff's case is that he came to know of this sale by his co-sharer Jogeshwari for the first time on January 2, 1944, at about 11 A.M. when Jadunath Singh, a resident of Majhaul informed him of this and that he at once completed formality of Talb-E-Mowashibat in the presence of some persons and that shortly after this he went to the properties of Tauzis 1130, 4201, and 1136, and also Mauza Buzurgabad and performed Talab-E-Ishtshad ; that he went then to the residence of the purchaser Gajadhar Singh at Matihani on January 3, 1944, and again performed the Talab-E-Ishtashad ; and that that very day he started for the residence of the vendor and performed the Talab-E-Ishtashad there on January 4, 1944.

The defence was that the story of any such ceremonies having been performed is wholly untrue and that, in fact, the plaintiff had knowledge of the sale from long before January 2, 1944, he having been a rival bidder for the purchase of these very properties. A detailed story of a proclamation by beat of drums of the proposed sale by Bindeshwari and the plaintiff's attempt to secure the property at the sale was set out by the defendant in the written statement and was sought to be proved by his witnesses. The Trial Court disbelieved the defendant's story on this point. He also rejected the defence allegation that the plaintiff was himself responsible for the forgery that was committed in respect of the deed of sale by altering the statement of the share in Majhaul Kilan Shri Ram that was sold, from 8 annas odd gandas to 4 annas odd gandas. On these findings he held the plaintiff's suit was not barred by estoppel.

Proceeding then to the consideration of the question whether the plaintiff came to know of the sale in favour of the first defendant for the first time on January 2, 1944; from Jadunath as alleged, the learned Judge has accepted the evidence given by the plaintiff and Jadunath on this point and held that the plaintiff's case that he received information for the first time on that day was true. He also accepted the evidence of the plaintiff as regards the requisite ceremonies having been duly performed.

The very important question that arose for the decision of the Court was whether the plaintiff's story that he came to know of the sale for the first time from Jadunath on January 2, 1944, is true. The Trial Court held that it was true. On this point the High Court came to a contrary conclusion. The learned Judges of the High Court were of opinion that the evidence of witness Jadunath was wholly unacceptable and that the plaintiff's evidence that he came to know of the alleged sale on January 2 1944, could not be accepted. After pointing out that the whole basis of the plaintiff's claim that he performed the ceremonies of Talab-E-Mowashibat and Talab-E-Ishtshad was without substance, they examined the evidence as regards the performance of the ceremonies and held that this evidence was also not acceptable.

The question in dispute before us is thus a pure question of fact, *viz.*, whether the plaintiff came to know of the sale for the first time on January 2, 1944, and thereupon performed the ceremonies of Talab-E-Mowashibat and Talab-E-Ishtashad. The main contention raised by Mr. Jha, who appeared in support of the appeal is that in considering this question of fact, the High Court approached the question from a wrong point altogether and was not justified in reversing the judgment of the Trial Court on that point.

The question as to what should be the right approach for a Court of Appeal in deciding a question of fact already decided in one way by the Judge in the Court of the first instance has often engaged the attention of the Courts, though the views expressed have not been uniform. Emphasis has been laid in some cases on the importance of the Court of Appeal deciding for itself the question of fact when the appeal is on facts, though remembering that it should not lightly do so not having had the advantage which the Trial Judge had of seeing the witnesses. More emphasis has been laid in other cases on the importance of not reversing the Trial Judge's findings of fact without compelling reasons. All the Courts in all the cases have stressed the rule which the Courts of Appeal should observe for themselves : that a Judge sitting on appeal not having had the opportunity of seeing and hearing the witnesses should think twice and more than twice before reversing the findings of fact arrived at by the Trial Court who has had that opportunity. To say that however is not to say that the Court of Appeal will never reverse a finding of fact of the Trial Court. In *Shunmugaroya Mudaliar* v. *Manikka Mudaliar*[1], Lord Collins pointed out that :

> " It is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have ; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but they are not witnesss of truth."

In the same Judgment Lord Collins referred approvingly to the judgment delivered by Lindley, Master of the Rolls, in the Court of Appeal in the case of *Coghlag* v. *Cumberland*[2] which set out the limitations of the rule :

> " Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that ts duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions ; and when the question arises which witness is to be believed rather than

1. (1909) 19 M.L.J. 640 ; L.R. 36 I.A. 185]: I.L.R. 32 Mad. 400 (P.C.).
2. L.R. (1898) 1 Ch. 704.

another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not ; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen ".

Almost the same view as expressed by Lord Thankerton in *Watt (or Thomas)* v. *Thomas.*[1]

" I. Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the Trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusions. II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate Court, either because the reasons given by the Trial Judge are not satisfastory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

These observations were cited with approval by Lord Reid in *Benmax* v. *Austin Motor Co. Ltd*[2]. (See also the observations of Mukerjee, J., in *Laljee Mahomed* v. *Girlder*[3]).

This question of the proper approach of the Court of Appeal to decisions on questions of fact arrived at by the Trial Court was considered by this Court in *Sarju Pershad* v. *Raja Jwaleshwari Pratap Narain Singh*[4]. Mukherjea, J., while delivering the judgment of the Court observed :—

" In such cases, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the Trial Judge on a question of fact."

The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be ; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an Appeal Court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.

Turning now to the instant case we find that the Trial Judge having seen and heard Jadunath and the plaintiff, believed their evidence on the point of information

1. (1947) 1 All E.R. 581, 587.
2. (1955) 1 All E.R. 326.
3. (1915) I.L.R. 43 Cal. 833.
4. (1950) S.C.J. 583 : 1950 S.C.R. 781, 784.

being given to the plaintiff by Jadunath about the sale on January 2, 1944, at about 11 A.M. It does not, however, appear that the learned Trial Judge arrived at his conclusion on the basis of the demeanour of these witnesses having created a favourable impression on his mind as to their credibility.

In scrutinising the evidence of the plaintiff and of Jadunath it must be borne in mind that the case of the plaintiff is that on January 2, 1944, certain information having been received by him, he performed the formalities. There is no case that the formalities were performed on any other date. Therefore, if the story of the communication of information on January 2, 1944, is not established then the whole case of the plaintiff must fail.

Jadunath's evidence on this point was :—

> "On 2nd January, 1944, I told Radha Babu at his house in Manjhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Motihani, this was about 11 A.M. Radha was startled to hear this and standing up said :—
>
> "Jo jo jaidad Babu Gajadhar Singh hath (then says) Maghrawalli Mussammat Jageshwari Kumari ne jo jo jaidad Babu Gajadhar Singh ke hath becha hai uske kharidne ka haq mera. Ham Kharida, Ham Kharida, Ham Kharida. Talab Mowasibat karte hain. Babu Jagdamba Prasad aur Babu Narayan Prasad gabah rahie................I came to know from a man of Chitral, 1 kos from Matihani that Gajadhar had a marriageable grandson."

Mention should be made in this connection also of the evidence of Jagdambi Prasad :—

> " On 2nd January, 1944, I had been to plaintiff's house at 10-30 A.M. Babu Narayan Prasad Singh, a pleader of Samastipur was at plaintiff's house at the time........Jadhunath Singh told Radha Prasad that Musammat Jageswari Kumari of Maghra had sold away her property in Manjhaul to Gajadhar Singh of Matihani. As soon as Jadunath Singh said this Radha Prasad Singh was startled stood up and said :
>
> I have a right to purchase this property. I have purchased ; I have purchased ; I have purchased. You Jagdamba Prasad Singh, you Narayan Prasad Singh and you Jadunath Singh, bear witness to this fact. He uttered these words thrice."

In deciding the question whether the information from Jadunath was the first information received by the plaintiff the Trial Judge had necessarily to consider whether the story that Jadunath came to know of the sale and brought this information on to the plaintiff on January 2, 1944, at about 11 A.M. was true or not. In arriving at a decision on the point it was necessary for him to consider the probabilities of the story, of Jadunath having gone to Gajadhar's house in search of a bride-groom and that there Gajadhar Singh informed him of the sale and then of the probability of the story that he would be taking upon himself the task of going to the plaintiff's house immediately on return to his village to convey this information, the probability of the story as to how the plaintiff reacted to the account and also the question of discrepancy. It does not appear that the learned Trial Judge took any of these matters into consideration. All that he says about Jadunath's credibility is that his evidence had been criticised on the ground that he was one of plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors and that in his opinion was not a valid ground for discarding the evidence of Jadunath Singh. We agree with the learned Judge that the mere fact that Jadunath was one of the plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors about 33 years ago would not by itself be a valid reason for discarding his testimony. The fact that this was not a valid reason for discarding his testimony does not, however, absolve the Court of the duty of testing the witness's testimony on the touch-stone of probability. The learned Judges of the High Court applied that touch-stone and came to the conclusion that Jadunath was not a witness of truth.

It is clearly a case where the words used by Lord Thankerton that the Trial Judge had not taken proper advantage of his having seen and heard the witnesses, and the matter would become at large for the appellate Court should apply. Here was a witness who could not be considered to be wholly independent. For, on his own showing he took the trouble of going to plaintiff's house after what may be taken

to be an arduous journey in an unsuccessful search for a bride-groom, to inform the plaintiff of a matter in which he himself had no interest—a witness who had figured, though many years ago, in a pre-emption suit brought by the same person. These facts made close scrutiny of the witness's account necessary before the Judge could say just by looking at him that he was a witness of truth. That scrutiny is conspicuous by its absence. Taking his evidence as a whole we find that his story that after coming to know of the sale in question he went to the house of Gajadhar, the first defendant, at village Matihani to make enquiries about a marriage proposal in respect of his daughter with his grandson and that it was in that connection that Gajadhar spoke to him about his purchase. But it is curious that in his examination in chief this witness came straight to his account of coming to the plaintiff's house on January 2, 1944, and informing him about the sale by Jogeshwari of her Milkiat to Gajadhar without saying a word as to his visit to Gajadhar's house, to the purpose of his visit and the manner in which Gajadhar gave him the information or even the detailed nature of the information. It was in cross-examination that he disclosed that he went to Gajadhar's house for "barthuari". It is in vain that we look into his evidence, whether in examination in chief or in cross-examination, for the exact information given by Gajadhar.

It has to be remembered in this connection that it is no longer disputed that Gajadhar himself had no interest in these properties and was a mere benamidar. Even if Gajadhar's own account that he was completely in the dark about these transactions be left out of account it was necessary for the Court to consider how far it was probable that Gajadhar would put on Jadunath a false story of purchase by himself of properties. It was urged that this Gajadhar did with a view to raise the Tilak which he could thus obtain. Jadunath himself has not said anything about the negotiations about Tilak but one Mahabir Ray has said that when he was going to the fields Gajadhar called him and there he heard Gajadhar demanding a higher Tilak stating that he had recently purchased properties at Majhaul from Mussammat. Jadunath himself does not mention having seen this Mahabir at Gajadhar's house. Jadunath claims to have gone to his house with a servant. Mahabir has not mentioned the presence of this servant. The question whether a man like Mahabir who was a total stranger to the plaintiff would be called by Gajadhar to hear such talks also requires the serious consideration of the Court. The Trial Judge does not appear to have given the slightest consideration to this aspect of the matter. The learned Judges of the High Court thought that there was no reason that Gajadhar would go out of his way to convey the information to Jadunath that he had purchased the Milkiat of Jogeshwari, the defendant No. 2. It is difficult not to agree to this estimate of probability.

Even more important was the question of probability as regards the story of the plaintiff's reaction when the information is said to have been given to him. Both Jadunath and Jagdambi say that the plaintiff was startled on getting information of the sale and at once uttered the words which have been set out already of the Table-E-Mowashibat. What would a man of ordinary prudence—not to speak of the man of property and with experience of previous litigation like the plaintiff—would do under such circumstances? There cannot be any two opinions on this question. He may consider it unwise to ask his informant any further question before making the first Talab, *i.e.*, Talab-E-Mowasibat. Once that was completed he would ply his informant with questions as to where he got this information, what the information exactly was, what properties had been sold, what the consideration was, and other connected questions. In this case, according to the evidence of Jadunath no such questions were asked by the plaintiff. In his examination-in-chief Jadunath says :—

"He (plaintiff) asked his syce to bring his tandom. He told Jagdamba Babu that he would go to make talab-e-isthashad and asked him to accompany him. While they were boarding the tandom Jai Prakash Narayan came that way. Radha Babu asked him also to accompany him. The same night Radha Babu met me at my house at 8 P.M. He asked me where I had obtained the information about the sale."

From this evidence it is clear that though Jadunath was at the place until the tandom had been brought and the plaintiff and Jagdamba got into the tandom and Jai Prakash Narayan also arrived, no question was put by the plaintiff to Jadunath in this behalf. It has to be noted that the plaintiff went to Jadunath's house the same night at 8 P.M. and the only question which was asked was : Where he had obtained the information about the sale and nothing was asked about what properties had been sold or for how much had they been sold. In cross-examination Jadunath made the further statement in these words :—

> "When I broke the news Radha Prasad did not ask me where I had received the information, or who had purchased the properties ; what properties had been purchased or what the consideration was."

Such conduct on the part of Jadunath is incredible and any Judge of facts with experience of normal human conduct could have no hesitation in coming to the conclusion that things could not have happened in the way Jadunath has described. Mr. Jha, the learned counsel for the appellant, urged that it would be unfair to base any conclusion on the supposed improbability or unnaturalness of such silence on the part of the plaintiff without having given him an opportunity to explain why he acted in this peculiar manner. It has to be noticed, however, that Jadunath had been examined and cross-examined on January 9, 1947, and when the plaintiff was put in the witness-box on the following day, *i.e.*, January 10, 1947, the lawyer who examined him had before him the fact that Jadunath's evidence had brought out this strange silence on the part of the plaintiff after he had been informed of the sale. It was his duty to obtain from Radha Prasad an explanation of such conduct. But he put no questions to Radha Prasad about this. The obvious reason is that Radha Prasad had no explanation to offer and the lawyer knowing this kept quiet. It appears to us that the learned Judges of the High Court of Patna were right in attaching great importance to this conduct of the plaintiff and were justified when they thought that this was an improbable story and rejected, in disagreement with the Trial Court, Jadunath's evidence altogether.

Mention has to be made of another circumstance which was noticed in the High Court judgment. That is as regards the exact information which is said to have been given by Jadunath. Jadunath's own account in the examination-in-chief is that he

> "told Radha Babu at his house in Majhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Motihani ".

In his cross-examination he first said :—

> "The information I gave was in these terms : 'Maghrawalli Musammat apni jaidad Babu Gajadhar Singh Motihani wale ke chan bech dia.' And then correcting himesIf said 'Babu Gajadhar Singh ne kaha ki Maghrawali Mussammat ki jaidad kharid kia.' "

It is not possible for anybody to remember exactly the words used by himself many years ago and it is reasonable to say that there was no substantial difference between the account given by him of this matter in his examination-in-chief and in cross-examination. It is interesting to remember, however, that in paragraph 4 of the plaint, it was stated that the information that Jadunath gave was :

> "That the defendants, 2nd and 3rd parties, had sold the properties entered in Schedule B of this Plaint, along with other properties to the defendant, 1st party, under a registered deed of sale."

According to Jadunath's evidence he does not appear to have mentioned the defendant 3rd parties as the sellers nor gave any details to show that the properties entered in Schedule B were covered by the sale nor that there was a registered deed of sale.

Turning to the evidence of the plaintiff and Jagdamba as regards the information said to have been given by Jadunath we find that Jagdamba says :

> "Jadunath Singh told Radha Prasad that Musammat Jogeshwari Kumari of Maghra had old away her property in Mahjaul to Gajadhar Singh of Motihani ".

According to the plaintiff himself the information which Jadunath gave was that Gajadhar Singh had purchased the Majhaul properties from the Maghrawali Musammat. An examination of Schedule-B shows that while the first 3 items were properties in mauza Majhaul, the 4th item is a property in Buzurgabad while the 5th item is a property in mauza Dundit. There appears to be no reason to think that these properties 4 and 5 could be even loosely considered to be properties in Majhaul or Majhaul properties. Commenting on Jagdamba's evidence on this point Mr. Justice Sinha, who delivered the leading judgment, stated :—

> " Plaintiff's witness No. 2 has stated that Jadunath told the plaintiff that the second defendant had sold her property in Majhaul to the first defendant. If that is so, it is a little difficult to understand how they went to Buzurgabad or to the other items of property to perform the ceremonies, if they ever did so."

It is strange that there should be such discrepancy between the evidence of Jadunath himself and the plaintiff and Jagdamba as to what actually was said. But if Jagdambi's account such as is supported by the plaintiff himself, is true then there is no acceptable explanation as to why the plaintiff could think of going to Buzurgabad at all as he and his witnesses say, he did.

It was the duty of the trial Judge to take into account these several considerations in testing the credibility of the account given by Jadunath, the plaintiff and Jagdambi that Jadunath informed the plaintiff on January 2, 1944, about the sale. He did not do so. The learned Judges of the High Court as a Court of Appeal were in duty bound to consider these questions before accepting the decisions of the learned trial Judge. The criticism that the approach of the learned Judges of the High Court was wrong is therefore wholly without foundation. The learned Judges of the High Court rightly took these matters into consideration and the decision they arrived at on these considerations that the trial Judge's assessment of the evidence was wrong and that Jadunath was not a witness of truth and that the account given by the plaintiff that the information was conveyed to him by Jadunath on January 2, 1944, should not be accepted is clearly right.

Once this decision is reached it is unnecessary to consider the further question whether any ceremonies were performed at all on 2nd, 3rd or 4th January, 1944, as stated by the plaintiff and his witnesses. Even if they were, they would be of no assistance to the plaintiff as the plaintiff has failed to show that it was on January 2, 1944, that he received the information about the same.

It is unnecessary for us therefore to decide the further question that appears to have been raised, *viz.*, that even if the evidence as regards the performance of the two Talabs, *i.e.*, Talab-E-Mowashiba and Talab-E-Ishtshad is accepted at its face value the requirements of the law have not been fulfilled. The High Court held that the plaintiff had failed to prove that the words used by him at the time of the making of the second demand of Talab-E-Ishtshad were sufficient to draw the attention of the witnesses to the specific properties in respect of which he was demanding his right of pre-emption. We express no opinion whether this view of the learned Judges of the High Court is correct or not. We also express no opinion on the two other questions, *viz.*, whether the trial Court acted in accordance with law in granting leave to the plaintiff to amend his plaint so as to include the alternative prayer for pre-emption in respect of 8 annas odd share of Tausa No. 1130 instead of 4 annas odd share as originally claimed and also whether the suit was bound to fail because there was no prayer for pre-emption for the Dakhili villages of Tausa No. 1130.

In our opinion the plaintiff having failed to prove that the information of the sale was conveyed to him by Jadunath on January 2, 1944, the suit was rightly dismissed by the High Court. This appeal is, therefore, also dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR AND K. SUBBA RAO, JJ.

Rm. Nl. Ramaswami Chettiar and others .. *Appellants**

v.

The Official Receiver, Ramanathapuram at Madurai .. *Respondent.*

Limitation Act (IX of 1908), *Article* 182 (5)—*Application for execution of decree by Official Receiver under Provincial Insolvency Act (V of* 1920)—*Previous application by transferee of decree in fraud of creditors—If one made in accordance with law and gives fresh starting point.*

Assuming that when an order is made under section 54 of the Provincial Insolvency Act annulling a transfer, the transfer stands annulled as from the date it was made, still the transfer stands till it is annulled and therefore, till then the transferee has all the rights in the property transferred. So long as the transferee has such rights he was competent to exercise them and such exercise would be legal and fully in accordance with law. The fact, if it be so, that the transfer on annulment, becomes void as from the date of the transfer cannot turn the exercise of right under the transfer, made prior to the annulment and which was legal when made, illegal. Applications for execution by such transferee of a decree were therefore fully in accordance with law when they had been made and that is all that Article 182 of the Limitation Act requires.

Sub-sections (2) and (7) of section 28 of the Provincial Insolvency Act cannot have the effect of vesting the decree in the Receiver till the tansfer had been annulled.

It cannot be said that an order of adjudication founded on an act of insolvency constituted by a transfer of property amounting to a fraudulent preference, itself and without more annuls that transfer.

Appeal by Special Leave from the Judgment and Order, dated the 6th December, 1950, of the Madras High Court in C.M.A. No. 332 of 1945 arising out of the Judgment and Order, dated the 17th January, 1945, of the Subordinate Judge, Devakottai, in E.P. No. 90 of 1944 in O.S. No. 14 of 1926.

M. S. K. Iyengar, Advocate, for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*T. R. V. Sastri*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Sarkar, J (on behalf of himself and *S. K. Das, J.*)—This appeal arises out of an application for execution of a decree for money and the only question is whether the application was made within the time prescribed by the Limitation Act.

The decree was passed in favour of one Venkatachalam Chettiar on May 9, 1935, against the appellants and certain other persons. On February 3, 1936, Venkatachalam Chettiar transferred the decree to his mother, Meenakshi Achi, by an assignment in writing never having tried to execute it himself. Soon thereafter, namely, on March 26, 1936, a creditor of Venkatachalam Chettiar presented a petition under the Provincial Insolvency Act (hereinafter referred to as the Act) for adjudicating him an insolvent on the ground that the transfer of the decree to Meenakshi Achi was a fraudulent preference and as such an act of insolvency. This petition remained pending for a considerable time and ultimately on January 7, 1939, an order was made on it adjudicating Venkatachalam Chettiar an insolvent. By that order respondent No. 1, the Official Receiver of Ramanathapuram, was appointed the receiver in insolvency and the insolvent's estate vested in him. This order was based on the finding that the transfer of the decree by Venkatachalam Chettiar to Meenakshi Achi was a fraudulent preference and an act of insolvency. On January 26, 1942, the Receiver made an application in the insolvency proceedings for an order annulling the transfer of the decree by the insolvent to Meenakshi Achi, and on this application an order was made on April 9, 1943, under section 54 of the Act annulling that transfer.

In the meantime, Meenakshi Achi had made two applications for execution of the decree as the assignee of it and a reference to them is necessary. The first

* C.A. No. 207 of 1955. 28th August, 1959.

of these applications was made on December 14, 1936, for an order recognising her as the assignee of the decree and for its execution against some of the judgment-debtors. This application was disposed of by an order made on September 27, 1937, recognising her right to execute the decree as the assignee and directing a certain compromise made presumably with the judgment-debtors concerned, to be recorded. The terms of this compromise are not relevant for the purpose of the appeal. Thereafter, on August 2, 1940, Meenakshi Achi as the assignee of the decree made another application for its execution, and this application was disposed of by an order made on September 30, 1940, dismissing it for default of prosecution. It will be remembered that it was after these applications and the orders thereon had been made that the order annulling the assignment of the decree to Meenakshi Achi was passed.

After the order annulling the transfer of the decree to Meenakshi Achi had been made, the Receiver considering himself then entitled to the decree, made an application for its execution on September 27, 1943. It is this application which has given rise to the present appeal.

The executing Court dismissed the application as having been made beyond the time prescribed by the Limitation Act. On appeal, the High Court at Madras set aside the order of the executing Court and held that the application was within time. Some of the judgment-debtors have now come up in appeal to this Court. The appeal is contested by the Receiver, the respondent No. 1. The other respondents among whom are the remaining judgment-debtors or their successors in interest, have not appeared.

Applications for execution like the present one are governed by Article 182 of the Limitation Act. That article provides a period of three years within which the application must be made. The article prescribes different points of time for different cases from which the period is to commence running. The first point of time so prescribed is the date of the decree. The fifth point of time prescribed is expressed in these words :

" (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution........"

The question for determination is whether the fifth point of time applies to the Receiver's application for execution. If it does not, the application must be held to have been made out of time, while if it does, the application would not be barred by limitation.

The Receiver contends that the two applications by Meenakshi Achi were " applications made in accordance with law to the proper Court for execution" within the meaning of the article and his application was within time as it had been made within three years of the date on which the final order on Meenakshi Achi's last application was made.

It is said on behalf of the appellants that in view of the orders in the insolvency proceedings it must be held that she was not entitled to the decree on any of the dates on which she applied for its execution and that her applications were therefore incompetent and not in accordance with law.

The appellants put their contention in several ways. It is first said that the order annulling the assignment of the decree to Meenakshi Achi related back to the date of the assignment with the result it has to be deemed as if she had never been entitled to the decree and that, therefore, the applications for execution by her were not competent and hence were not in accordance with law.

We think this contention is wholly unfounded. We will assume for the purpose of the present case that when an order is made under section 54 of the Act annulling a transfer, the transfer stands annulled as from the date it was made. But even so, the transfer stands till it is annulled and therefore, till then, the transferee has all the rights in the property transferred. So long as the transferee had such rights he was competent to exercise them and such exercise would be legal and fully in accordance

with law. The fact, if it be so, that the transfer on annulment, becomes void as from the date of the transfer cannot turn the exercise of a right under the transfer, made prior to the annulment and which was legal when made, illegal. Meenakshi Achi had hence full legal competence to execute the decree, till the transfer of it to her was annulled. Her two applications for execution of the decree were therefore fully in accordance with law when they had been made and that is all that Article 182 requires.

Next, it is said that the provisions of sub-sections (2) and (7) of section 28 of the Act make Meenakshi Achi's two applications for execution incompetent in law. These provisions have now to be considered. Sub-section (2) says that upon the making of an order of adjudication the whole of the property of the insolvent shall vest in the receiver and sub-section (7) says that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made. It is said that under these provisions, the assets of the insolvent in this case, including the decree under execution, became vested in the Receiver on March 26, 1936, when the petition for adjudicating him an insolvent had been presented, and consequently, the two applications for execution by Meenakshi Achi which had been made after that date were incompetent and not in accordance with law.

It seems to us that this contention also is fallacious. These sub-sections cannot have the effect of vesting the decree in the Receiver till its transfer to Meenakshi Achi had been annulled. Till then it was not a part of the insolvent's estate. The annulment, as we have earlier pointed out, was made under section 54 of the Act. That section provides that certain transfers of property by the insolvent would be deemed fraudulent and void as against the receiver in insolvency and shall be annulled by Court. It is obvious that a transfer liable to be annulled under this section remains a perfectly valid transfer till it is annulled. If it had become void automatically on an order for adjudication being made, there would be no need to provide for its annulment by Court. It would follow that Meenakshi Achi was legally possessed of the decree and competent to apply for its execution till the transfer of the decree to her was annulled under section 54.

It is then said that though it may generally be that a transfer liable to be annulled under section 54 remains valid till it is annulled, that is not so where the transfer is the act of insolvency upon which the order of adjudication is founded, for, in such a case the order itself annuls the transfer. So, it is said that as the order of adjudication in this case was founded upon the transfer of the decree to Meenakshi Achi, that transfer became annulled on the order being made on January 7, 1939, and the second application for execution by Meenakshi Achi was incompetent. It is true that if this is the correct view, then the receiver's application for execution must be held to have been made beyond the time allowed, for, it had been made more than three years after the final order on the first application for execution by Meenakshi which is the only order on which the Receiver can on this basis rely for resorting to the fifth point of time fixed by Article 182.

Now this argument is based solely on the decision of the Judicial Committee in *Mahomad Siddique Yousuf* v. *Official Assignee of Calcutta*[1], which it is said held that where a transfer is the act of insolvency on which the order of adjudication is founded, that order itself has the effect of annulling the transfer.

We think this case has been misunderstood. We find nothing in it to lead to the view that an order of adjudication founded on an act of insolvency constituted by a transfer of property amounting to a fraudulent preference, itself and without more annuls that transfer. That was a case decided under the Presidency-towns Insolvency Act. In that case one of the acts of insolvency on which the order of adjudication had been founded was a transfer by the insolvent of a certain decree in his favour to the appellant, which was held to have been a fraudulent preference. The transferee was not a party to the order of adjudication. The Official Assignee, that is,

1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).

the Receiver in insolvency, applied to have that transfer annulled. It was contended on behalf of the Official Assignee before the Judge in insolvency in the High Court that the order of adjudication holding the transfer to be a fraudulent preference was conclusive and binding on the transferee though he was not a party to the insolvency petition. It was said that that had been held in *Ex parte Learoyd*[1], which turned on the English Bankruptcy Act, 1869, the terms of which were similar to the relevant provisions in the Presidency-towns Insolvency Act. The learned Judge felt some difficulty in view of a decision of the Madras High Court to which it is unnecessary to refer, whether the principle of the English decision applied to a case under the Presidency-towns Insolvency Act. He, therefore, went into the facts and came to the conclusion that the transfer amounted to a fraudulent preference and thereupon made an order annulling it. On appeal the appellate Judges of the High Court

> "expressed some doubt whether the intent to prefer was in fact proved; but they were both of opinion (following *Ex parte Learoyd*[1]), that the order of adjudication was conclusive and could not be disputed."

They held that this was so though the transferee was not a party to the order of adjudication. In that view of the matter the appellate Judges felt that there was a decision binding on the transferee that the transfer was void as a fraudulent preference and they thereupon annulled the transfer as a matter of course. The judgment in the High Court are reported in 45 C.W.N. 441. The transferee who was not a party to the insolvency petition, then asked for an extension of time to prefer an appeal from the order of adjudication but this was refused.

Then the matter was taken up to the Judicial Committee in further appeal. The Judicial Committee held that the appellate Judges of the High Court were right in their view that the principle of *Ex parte Learoyd*[1], applied to cases under the Presidency-towns Insolvency Act, but they thought that in the circumstances of the case the order of the appellate Judges refusing to extend time for the transferee to appeal from the order of adjudication was not justified and set it aside and extended the time to appeal. In order however to make the order in the contemplated appeal should it succeed, effective, they also set aside the order annulling the transfer though in their view it was "plainly right". This would appear from their observations at page 99 of the report:

> "It is plain that an appeal against the adjudication order would be useless while the orders stand in this independent proceeding declaring the transfer void because of the adjudication order itself. On the other hand, the decision of the High Court avoiding the transfer is plainly right while the adjudication order stands and the appellant as a condition of the extension of time must pay, as he has offered to do, the costs thrown away."

And at page 100 they said:

> "The order is without prejudice to the right of the Official Assignee, if he is so advised, to make a further application to have the transfer declared void."

It is therefore abundantly clear that all that the Judicial Committee held in *Mohamed Siddique Yousuf's case*[2], was that in a case under the Presidency-towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the Official Assignee to have that transfer annulled on the ground that it was a fraudulent preference, the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case therefore the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise

1. (1878) L.R. 10 Ch. D. 3.
2. (1943) 2 M.L.J. 160; L.R. 70 I.A. 93 (P.C.).

they would not have stated that "the decision of the High Court avoiding the transfer is plainly right" nor while setting aside the order annulling the transfer reserved the right of the Official Assignee, should the occasion arise, to make a further application to have the transfer declared void. The case therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view, this is the correct position and nothing to the contrary has been brought to our notice.

An argument had been raised at the bar that under the Provincial Insolvency Act an order of adjudication has not that binding force which *MahomedSiddique Yousuf's case*[1], held it had under the Presidency-towns Insolvency Act. It was said that this was so because the terms of the two Acts were dissimilar. We do not think it necessary to express any opinion on this question. We have discussed *Mahomed Siddique Yousuf's case*[1], only to show that it does not support the proposition for which it was cited. It is unnecessary for us to say whether it will govern a case under the Provincial Insolvency Act or what the effect of the dissimilarity pointed out in the terms of the two Acts is. That question is not before us.

There remains one other point to deal with. It is said that the Official Receiver was not entitled to take advantage of the applications for execution made by Meenakshi Achi as he had not been claiming under her but had actually claimed against her. This contention is equally unfounded. Article 182 does not say that no advantage of a previous application can be taken for the purposes of saving the bar of limitation, unless it had been made by a person under whom the applicant in a later application which is said to be barred by limitation, claimed. All that the article contemplates is an application for execution of a decree made within three years of the final order on a previous application made in accordance with law for the execution of the same decree. That being so, we must reject this contention of the appellants also.

In view of what we have already said, it becomes unnecessary to deal with the other points raised at the bar.

In the result, we think that the appeal should be dismissed and we order accordingly. The appellant must pay the costs of this appeal.

Subba Rao, J.—This appeal raises a question of limitation. There is no dispute about the facts. On May 9, 1935, one Venkatachalam Chettiar obtained a compromise decree against the appellants and respondents 2, 3 and 4 and predecessors in interest of respondents 5 and 6 in A. S. No. 226 of 1930, on the file of the High Court of Madras. Under the decree the defendants were directed to pay the plaintiff therein a sum of Rs. 1,10,101-4-0 together with interest at 3 per cent. per annum in certain instalments, the last of the instalments being payable on May 30, 1942. The decree also provided that in the event of a default in payment of any one of the instalments, the entire decree amount would become payable. On February 27, 1937 , one Visvanathan Chettiar obtained a decree against the said Venkatachalam Chettiar in O.S. No. 22 of 1936, on the file of the Court of Subordinate Judge, Devakottai, for a sum of Rs. 33,000. The suit ending in the above decree was filed on January 29, 1936. On February 3, 1936, Venkatachalam Chettiar executed a deed of assignment transferring the deeree obtained by him in O.S. No. 14 of 1926 to his mother, Meenakshi Achi, for consideration. On March 26, 1936, Viswanathan Chettiar filed I.P. No. 10 of 1936 in the Court of Subordinate Judge, Devakottai, for adjudicating Venkatachalam Chettiar an insolvent on the ground that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency. On December 14, 1936, the assignee, Meenakshi Achi, filed E.P. No. 37 of 1937 for recognition of the assignment in her favour and for execution of the decree. The judgment-debtors did not object either to the recognition of the assignment of the decree or the execution thereof. The said Visvanathan Chettiar intervened in the execution petition and

1. (1943) 2 M.L.J. 16 : L.R. 70 I.A. 93 (P.C.).

applied in E. A. No. 817 of 1937 for stay of execution of the decree on the ground that he had filed an insolvency petition against the decree-holder and also on the ground that the said assignment was nominal. The learned Subordinate Judge disallowed the objection of the creditor, recognized the assignment, and permitted the assignee-decree-holder to proceed with the execution of the decree. On September 27, 1937, a settlement was entered into between the assignee-decree-holder and the judgment-debtors and the said execution petition was closed. On January 7, 1939, Venkatachalam Chettiar was adjudicated insolvent on the ground that the assignment of the said decree by him in favour of his mother, Meenkshi Achi, was an act of insolvency, whereupon his properties vested in the first respondent, the Official Receiver, Ramanathapuram, at Madurai. On August 2, 1940, the assignee-decree-holder filed another execution petition, E.P. No. 243 of 1940, and it was struck off on September 30, 1940. On January 26, 1942, the Official Receiver filed I.A. No. 20 of 1942 in I.P. No. 10 of 1936 in the Court of the Subordinate Judge, Devakottai, for setting aside the assignment, and by order, dated April 9, 1943, the assignment was set aside by the Court on the ground of fraudulent preference within the meaning of section 54 of the Provincial Insolvency Act, 1920, hereinafter called the Act. On September 27, 1943, the Official Receiver filed a fresh execution petition, E.P. No. 90 of 1944, for executing the decree. It was alleged by the appellants and the respondents 2 to 6, *inter alia*, that the said execution petition was barred by limitation on the ground that the two earlier execution petitions were not in accordance with law within the meaning of Article 182, clause (5) of the Limitation Act. The Official Receiver contended that they were in accordance with law and therefore the present execution petition was in time. He further pleaded that the present execution petition was also saved from the bar of limitation by the payments made by the judgment-debtors to Meenakshi Achi, and that, in any event, the decree in respect of the last three instalments was not barred by limitation. The learned Subordinate Judge rejected the contentions of the Official Receiver and held that the execution petition was barred by limitation. The Official Receiver preferred an appeal against the said order of the Subordinate Judge to the High Court of Madras. Govinda Menon and Basheer Ahmed Sayeed, JJ., of the said High Court came to the conclusion that the earlier execution petitions were in accordance with law and, therefore, the present execution petition was within time. They also expressed the view that the payments made by the judgment-debtors to Meenakshi Achi were valid payments and therefore they also saved the bar of limitation. In any view, they found that the last two instalments were not barred by limitation. On their findings, the learned Judges of the High Court set aside the order of the learned Subordinate Judge and remanded the execution petition to the Court of the Subordinate Judge, Devakottai, for taking steps in furtherance of execution. The present appeal to this Court was filed against the said order of remand.

Learned counsel for the appellants contended that the execution petitions, E.P. No. 37 of 1937 and E.P. No. 243 of 1940, were not in accordance with law for the following reasons: (1) The order, dated April 9, 1943, annulling the assignment of the decree by Venkatachalam Chettiar in favour of his mother, Meenakshi Achi, related back to the date of the transfer *i.e.*, February 3, 1936, and, therefore, E.P. No. 37 of 1937, which was filed on December 14, 1936 and E.P. No. 243 of 1940, which was filed on August 2, 1940, were ineffective to save the bar of limitation, as on the dates they were filed Meenakshi Achi had no title in the decree; (2) the order of adjudication, dated January 7, 1939, was based on the finding that the said assignment of the decree was an act of fraudulent preference and that the order related back to the date of the filing of I.P. No. 10 of 1936 on March 26, 1936, and, therefore the two execution petitions filed thereafter were filed by a person without title, with the result that the said two petitions were not in accordance with law; (3) assuming that the said two execution petitions were in accordance with law, the Official Receiver neither claims under, nor represents, the assignee-decree-holder, and, therefore, he has no *locus standi* to file the present execution petition ; (4) payments made by the judgment-debtors to Meenakshi Achi, who had no title in the decree, could not save the bar of limitation ; and (5) as Meenakshi Achi in her execution petitions, by

exercising her option, claimed the entire decree amount, the Official Receiver cannot now claim that the last two instalments are within time.

At the outset it may be stated that it would be sufficient if we considered the objections of the appellants in regard to E.P. No. 243 of 1940, for, if that was not in accordance with law, the present execution petition would be barred by limitation. The validity of E.P. No. 37 of 1937 was also questioned on the same grounds of attack taken against the later execution petition.

The relevant part of the Limitation Act is Article 182 and it reads :

Description of application.	*Period of Limitation.*	*Time from which period beings to run.*
For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Prodecure, 1908.	Three years ; or, where a certified copy of the decree or order has been registered, six years.	(5). (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step in aid or order.

Under this Article the latest execution petition should have been filed within three years from the date of the final order passed on an application made in accordance with law to the proper Court of execution. Taking first the second contention of the learned counsel for the appellants, the question may be posed thus : Whether the execution petition, E.P. No. 243 of 1940, filed on August 2, 1940, by Meenakshi Achi after Venkatachalam Chettiar was adjudicated insolvent on January 7, 1939, was one in accordance with law. If the order of adjudication of Venkatachalam Chettiar on the ground that the assignment of the decree made by him in favour of Meenakshi Achi was an act of insolvency *ex proprio vigore* annul the transfer in her favour, the execution petition filed by her after the said order of adjudication would not be one filed in accordance with law. On the other hand, if the assignment of the decree continued to be good till it was annulled on an application filed by the Official Receiver, which was done in the present case on April 9, 1943, the execution petition, subject to another argument that I would consider at a later stage, would be one filed in accordance with law. What then is the legal effect of such an order of adjudication ? The question in the main falls to be decided on a true construction of the relevant provisions of the Act. Section 6 of the Act defines the act of insolvency ; it enumerates eight acts of insolvency, and one of them is a transfer made by a debtor which would be void as a fraudulent preference if he were adjudicated insolvent. Section 7 enables a creditor or a debtor to present an insolvency petition for adjudicating the debtor an insolvent. Section 9 lays down the conditions on which a debtor may petition. Section 13 prescribes the particulars a creditor has to give in his petition, and one of the particulars to be given is the act of insolvency committed by the debtor. When an insolvency petition is admitted, section 19 provides that notice should be given to creditors in such manner as may be prescribed, and, when the debtor is not the petitioner, notice of the order admitting the petition should be served on the debtor. On the date fixed for hearing, the Court should require proof of the matters mentioned under section 24 of the Act; it enables the Court to examine the debtor and the creditors and take the evidence adduced by them. After making the necessary enquiry, the Court may dismiss the petition or make an order of adjudication. On the making of the said order of adjudication, the whole property of the insolvent would vest in the Court or in the Receiver appointed under the Act, and the said property becomes divisible among the creditors. Under sub-section (7) of section 28 the order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition. Under section 30 notice of an order of adjudication stating the name, address and description of the insolvent, the date of adjudication, the period within which the debtor should apply for his discharge and the Court by which the adjudication is made, should be published in the Official Gazette

and in such manner as may be prescribed. It will be seen from the aforesaid provisions that till an order of adjudication is made, the person to whom the insolvent transferred his property does not come into the picture at all. The purchaser is neither a party to the proceedings nor any notice is given to him. It would, therefore, be contrary to all principles of natural justice to hold that the finding arrived at in regard to an assignment of a property by the insolvent in favour of a third party behind his back, is binding on him. If the Legislature intended that the order should have that effect, it would have provided for personal or, any rate, public notice to the purchasers, or would have given in express terms such a binding effect, and the fact that it did not do so is a clear indication of the legislative intention that an incidental finding was not intended to have such a far-reaching effect.

On the other hand, the Act makes ample provision for setting aside such transfers. Sections 53 and 54 of the Act enable the Official Receiver to have voluntary transfers made within two years of the insolvency petition and that made in fraudulent preference of one creditor over another within three months from the date of the petition annulled by the Court. If the Legislature intended to exclude a transfer constituting an act of insolvency from the operation of these provisions, it would have introduced a proviso to that effect. Therefore, unless such a transfer is duly annulled in the manner prescribed, the transfer would be valid.

That this is the intention of the Legislature is also made clear by the other provisions of the Act *vis-a-vis* transfers. The Act provides for three stages : (1) Transfers made before the presentation of the insolvency petition; (2) transfers made after the presentation of the petition and before the order of adjudication; and (3) transfers made after adjudication. A transfer made after adjudication is not binding on the Receiver. A transfer by an insolvent after the filing of the petition is also not binding on the Receiver subject to a protection clause. A purchase in good faith under a sale in execution (section 51 (3)) and a transfer *inter vivos* in good faith for valuable consideration (section 55) fall within the protected class of transactions. A transfer before the filing of the petition is binding on the Receiver unless it is annulled under sections 53, 54 or 54-A of the Act. The scheme of the Act in regard to transfers clearly demonstrates that transfers before the filing of the petition are good unless they are annulled in the manner prescribed in the Act and even the doctrine of relating back of the order of adjudication does not reach them as they fall on the other side of the line. If it was the intention of the legislature that the said order by its own force should declare the transaction void, it would have fixed the date of the transfer as the *datum* line instead of the date of the filing of the petition. It appears to me that this was designedly done to give an opportunity to the party affected to defend his title when the Official Receiver filed an application to annul the transfer. Sections 53, 54 and 28 must be reconciled and they can be reconciled without doing violence to the language of the said sections if the order of adjudication is conclusive only in regard to the status of the insolvent it declares and the transfer, though it formed the basis of the adjudication, so far as the transferee is concerned, continues to be good till set aside.

Strong reliance is placed upon the judgment of the Judicial Committee in *Mohomed Siddique Yousuf* v. *Official Assignee of Calcutta*[1], in support of contention that the finding that the transfer of the decree in favour of Meenakshi Achi was an act of insolvency was binding on the transferee, though she was not a party to the adjudication proceedings. That decision turned upon the relevant provisions of the Presidency towns Insolvency Act, 1909, and the corresponding provisions of the Bankruptcy Act of 1869. That decision cannot apply to a situation created under the Provincial Insolvency Act, unless the provisions of the said Act are *pari materia* with those of the Presidency-towns Insolvency Act and the Bankruptcy Act. A comparative study of the three sets of provisions by placing them in juxtaposition will facilitate a better understanding of the problem.

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1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).

Bankruptcy Act, 1869.	*The Presidency-towns Insolvency Act,* 1909.	*The Provincial Insolvency Act,* 1920.
Section 10.—A copy of an order of the Court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this Act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication.	*Section* 116 (1).—A copy of the Official Gazette containing any notice inserted in pursuance of this Act shall be evidence of the facts stated in the notice. (2) A copy of the Official Gazette containing any notice of an order of adjudication shall be conclusive evidence of the order having been duly made, and of its date.	*Section* 30.—Notice of an order of adjudication stating the name, address and description of the insolvent, the date of the adjudication, the period within which the debtor shall apply for his discharge, and the Court by which the adjudication is made shall be published in the Official Gazette and in such other manner as may be prescribed.
Section 11.—The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication.	*Section* 51.—The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at— (*a*) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (*b*) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition: Provided that no insolvency petition or order of adjudication shall be rendered invalid by reason of any act of insolvency committed anterior to the debt of the petitioning creditor.	*Section* 28 (7).—An order of adjudication shall realate back to, and take effect from, the date of the presentation of the petition on which it is made.
	Section 56 (1).—Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudicated insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee.	*Section* 54 (1).—Every transfer of property, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver, and shall be annulled by the Court.

Bankruptcy Act, 1869.	*The Presidencey-towns Insolvency Act,* 1909.	*The Provincial Insolvency Act,* 1920.
	(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the insolvent.	(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

With some difference in the phraseology, with which we are not concerned, sections 116 and 51 of the Presidency-towns Insolvency Act are in terms similar to the corresponding sections, sections 10 and 11 of the Bankruptcy Act. Section 10 of the Bankruptcy Act and section 116 of the Presidency-towns Insolvency Act make the copy of the Official Gazette containing the order of adjudication conclusive evidence of the date of adjudication and the fact that the order of adjudication was duly made. But section 30 of the Provincial Insolvency Act, only enjoins that the notice of the order of adjudication with necessary particulars should be published in the Official Gazette and in such manner as may be prescribed ; but a copy of the said Gazette containing the said notification is not made conclusive evidence either of the facts mentioned therein or of the fact that adjudication has been duly made. Section 51 of the Presidency-towns Insolvency Act is in terms similar to that of section 11 of the Bankruptcy Act and under both the sections the insolvency of a debtor relates back to the time of the commission of the act of insolvency on which the order of adjudication has been made against him. But under section 28 (7) of the Provincial Insolvency Act, the order of adjudication relates back to and takes effect from the date of the presentation of the application on which it is made. Under section 56 the Presidency-towns Insolvency Act, transfer of a property in favour of a creditor with a view to give preference to him over other creditors shall be deemed fraudulent and void as against the Official Assignee, whereas under section 54 of the Provincial Insolvency Act, the said transfer has to be annulled by the Court. There are, therefore, essential differences in the structure of the scheme between the three Acts in the matter of adjudication.

With this background let us look at the Privy Council decision in *Mahomed Siddique Yousuf's case*[1] to ascertain the basis of that decsion. The facts in that case were : On January 20, 1939, the insolvent assigned to the appellant a decree obtained by him for consideration. On April 19, 1939, the petitioning creditor, filed a petition in the High Court for the adjudication of the insolvent as such. One of the acts of insolvency alleged was the said assignment of the decree in favour of the appellant. On June 13, 1939, an adjudication order was made against the insolvent. No one appeared except the petitioning creditor, and the order recited that the insolvent had committed each of the acts of insolvency alleged in the petition. On November 23, 1939, the Official Assignee gave notice of motion in the Insolvency Court for a declaration that the indenture of assignment dated January 20, 1939, should be declared void as against the Official Assignee and that the transfer should be set aside. The Judge in Insolvency held on the merits that the said transfer was void under section 56 of the Presidency-towns Insolvency Act. On appeal the High Court held that the order of adjudication was conclusive evidence against the appellant that the assignment was a fraudulent preference, and on that ground it declared the transfer void. On further appeal, the Privy Council agreed with the High Court. Relying on the decision in *Ex parte Learoyd*[2], a decision on analogous provisions of the Bankruptcy Act, the Privy Council made the following observations at page 98 :

"The provisions of the Presidency-towns Insolvency Act, 1909, are also in similar terms, and their Lordships feel no doubt that the principles of the English decision are as valid in India as in England. No doubt it is anomalous that a decision affecting the right of a third party should be conclusively determined against him in his absence, and even without notice to him, but the words of the section and the importance of maintaining the status of the debtor as determined by an order

1. (1943) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.). 2. (1878) L.R. 10 Ch. D. 3.

of adjudication, and the necessity of securing the stability of the administration of the debtor's estate once his status has been fixed, have been justly held to outweigh the consideration of hardship to the private citizen."

But the Privy Council came to the conclusion, on the facts, that a case was made out for the High Court for excusing the delay in preferring the appeal against the order of adjudication. On that view they set aside the order of the High Court and made the following observations for its guidance, at page 99 :

"It may be that if the appellant takes advantage of the extension of time and appeals, the High Court may adopt the procedure in *Ex parte Tucker*[1] and content themselves with striking out the act of bankruptcy complained of, and leaving the Official Assignee to make a fresh application without themselves determining the facts."

This decision decides three points, namely, (1) having regard to the express provisions of the Presidency-towns Insolvency Act, and for maintaining the status of the debtor and the stability of the administration of his estate, the decision affecting the rights of a third party though made behind his back, would be binding on him ; (ii) an appeal can be entertained against the order of adjudication at the instance of the transferee, and, if necessary, by excusing the delay in preferring the appeal ; and (iii) in such an appeal, the High Court may strike out one of the acts of insolvency, *i.e.*, the transfer in favour of the appellant, and leave it to the Official Assisgnee to make a fresh application. Though the principles underlying the relevant provisions of the Act were expounded, the decision mainly rested on the express provisions of the Presidency-towns Insolvency Act. Nor did the Privy Council hold that when there was an order of adjudication on the basis of an act of insolvency, there was no necessity on the part of the Official Assignee to take out an application for setting aside the transfer constituting the act of insolvency. Though it is not very clear, it appears to me that what the Privy Council stated was that in such an application the decision on the transfer forming part of the order of adjudication is conclusive evidence of the invalidity of the transfer. To put it differently, in such an application the Official Assignee need not prove afresh that the transfer was a fraud on creditors or an act of fraudulent preference. That decision was mainly based upon *Ex parte Learoyd*[2], which in its turn was founded upon the interpretation of sections 10 and 11 of the Bankruptcy Act—sections corresponding to sections 116 and 51 of the Presidency-towns Insolvency Act. A scrutiny of that decision, therefore, will disclose the *raison detre* of the decision of the Privy Council. There, on August 30, 1877. an insolvent executed in favour of George Payne a bill of sale of his household furniture, etc., by way of security for consideration. The goods remained in the apparent possession of the mortgagor until January 1, 1878, when Payne removed them, On January 3, 1878, a bankruptcy petition was presented against the insolvent by a creditor, relying upon an alleged act of bankruptcy, namely, that the insolvent, being a trader, departed from his dwelling-house on December 31, 1877. On January 3, 1878, an order of adjudication was made on the petition upon proof of the said act of bankruptcy, and that order was advertised in the usual way in the London Gazette. On January 8, 1878, the goods removed by Payne were sold on his behalf. The trustees in the Bankruptcy claimed the proceeds of the sale, and the Judge of the County Court ordered the payment. On appeal Bacon, C.J., allowed the appeal on the ground that it had not been established that there was an act of insolvency before Payne took possession of the goods. On further appeal, the Court of Appeal set aside the judgment of Bacon, C.J., on the ground that by virtue of sections 10 and 11 of the Bankruptcy Act, 1869,

"a bill of a sale holder is conclusively bound by the adjudication so long as it stands, and cannot dispute that the act of bankruptcy on which the adjudication professedly proceeded was in fact committed,"

and that the trustee's title related back to that act of bankruptcy. James, L.J. after a brief survey of the historic background of the Bankruptcy Act, based his judgment mainly on the construction of the provisions of sections 10 and 11 of the Bankruptcy Act. The learned Judge observed at page 8 :

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1. (1879) L.R. 12 Ch. D. 308.
2. (1878) L.R. 10 Ch. D. 3.

"A man cannot be 'duly' adjudged a bankrupt, unless the great requisite of all exists, that he has committed an act of bankruptcy. That is the capital offence of which he must have been guilty before he can be 'duly' adjudged a bankrupt. That he has been 'duly' adjudged a bankrupt, necessarily involves the previous commission of an act of bankruptcy. The mere fact that an adjudication has been made could have been proved without the aid of section 10. That section may, however, only involve this, that some act of bankruptcy had been committed before the adjudication was made. But then comes section 11, which has no operation at all as between the bankrupt and the trustee. The bankrupt has no rights whatever; all his rights have been transferred to the trustee. The mere fact that section 11 is dealing with the relation back of the trustee's title, shews that it is dealing with the rights of third persons, and not merely with the rights of the bankrupt and persons indebted to him...........Then section 11 goes on to provide that, by way of enlargement of the trustee's title, he may go behind the act of bankruptcy on which the adjudication was founded, and may, under certain circumstances and subject to certain limitations, prove that other earlier acts of bankruptcy have been committed, and if this is done the trustee's title is to relate back to the earliest act of bankruptcy which is proved to have been committed within twelve months before the adjudication. This, however, is to be proved by evidence, whereas the act of bankruptcy on which the adjudication is founded is proved by the production of the adjudication itself. It seems to me to be impossible to evade the words of these sections."

Baggallay, L.J., also, after emphasizing on the words "duly made" in section 10 of the Bankruptcy Act, remarked on the scope of section 11 thus, at page 10:

"But then comes section 11, which I think, if more was needed, makes the adjudication conclusive on third persons that the act of bankruptcy on which it was founded was really committed."

Thesiger, L.J., also said much to the same effect, at page 11:

"We start, therefore, with this, that we are bound to hold conclusively that a 'due' adjudication was made on the 3rd January. It must, therefore, have been founded upon a proper act of bankruptcy. Then section 11 goes still further, and it is important to compare it with the provisions contained in the prior Bankruptcy Acts. Sections 234 and 235 enabled third person to dispute the act of bankruptcy upon giving notice of their intention so to do. That provision is swept away by the Act of 1869, and in language clear and distinct the Legislature has said by section 11 that 'the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt'".

From the aforesaid extracts from the judgments, it is manifest that the decision turned upon the express provisions of sections 10 and 11 of the Bankruptcy Act. Under section 10 of that Act, the Gazette containing the order was conclusive evidence that the order of adjudication was duly made on the basis of an act of insolvency and section 11 fixed the *datum* line for the commencement of the trustee's title from the act of bankruptcy. The former section made the order of adjudication conclusive against third parties and the latter section vested, the title of the property concerned in the Official Receiver from the date of the act of insolvency. This judgment, therefore, cannot be applied to an Act which differs in all respects from the relevant provisions of sections 10 and 11 of the Bankruptcy Act on the basis of which that judgment was given. In the Provincial Insolvency Act, neither the order of adjudication is conclusive evidence that it has been duly made, nor the trustee's title dates back to the act of insolvency on which the adjudication is founded. I am, therefore, of the view that neither the decision in *Ex parte Learoyd*[1] based on the provisions of the Bankruptcy Act, 1869, nor the Privy Council decision in *Mahomed Siddique Yousuf* v. *Official Assignee of Calcutta*[2], based upon the provisions of the Presidency-towns Insolvency Act, has any bearing in construing the relevant provisions of the Provincial Insolvency Act. A similar view was expressed by a Full Bench of the Madras High Court in *The Official Receiver, Guntur* v. *Narra Gopala Krishnayya*[3] and by a Full Bench of the Nagpur High Court in *P. G. Sahasrabudhe* v. *Kila Chand Deochand & Co., Bombay*[4]. Both Courts held that the decision of the Privy Council did not apply to a case under the Provincial Insolvency Act and that a transferee, who was not a party to the adjudication proceeding, could contend in subsequent proceedings for annulment that his transfer was good notwithstanding that the order of adjudication was based on the alleged transfer as being an act of insolvency. I accept the correctness of the said two decisions. If so, it follows that the order of adjudication made in the present case did not by its own force divest the title of Meenakshi Achi and vest

1. (1878) L.R. 10 Ch. D. 3.
2. (1943) 2 M.L.J. 160: L.R. 70 I.A. 93 (P.C.).
3. (1945) 1 M.L.J. 17: I.L.R. (1945) Mad. 541 (F.B.).
4. I.L.R. (1947) Nag. 85 (F.B.).

it in the Official Receiver and that she continued to be the transferee of the decree at the time when she filed the second execution petition, E.P. No. 243 of 1940.

For the same reasons, when E.P. No. 37 of 1937 was filed, Meenakshi Achi had subsisting title to the decree under the transfer deed dated February 3, 1936, and, therefore, the said execution petition was also in accordance with law.

The next argument of the learned counsel for the appellants is that the order of the Insolvency Court dated April 9, 1943, related back to the date of the transfer *i.e.*, February 3, 1936, and that by the order of anulment, the transfer became void from its inception, with the result that on the dates when the Execution Petitions Nos. 37 of 1937 and 243 of 1940 were filed, Meenakshi Achi had no title to the decree, and, therefore, the said petitions were not filed in accordance with law. The answer to this contention depends upon the true legal effect of the order of annulment of the transfer on the ground of fraudulent preference. That part of section 54 of the Provincial Insolvency Act so far relevant to the present enquiry reads thus :

Section 54 (1).—" Every transfer of property........in favour of any creditor, with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent."

It is clear from the provisions of this section that a transfer of property by a debtor before insolvency in favour of a creditor giving him preference over other creditors is not absolutely void. As between the transferor and the transferee, the title in the property conveyed passes from one to the other, but it is liable to be annulled at the instance of the Receiver. This is because the Insolvency Act confers on the Official Receiver a title superior to that of the insolvent enabling the former to get it annulled in the interest of the creditors. Sub-section (2) of that section also indicates that the transfer is not void *ab initio*, for under that sub-section the rights of any person, who in good faith and for valuable consideration acquired title through or under a creditor of the insolvent, are protected. If the transfer was *ab initio* void in the sense that it is a nullity, all the depending transactions should fall with it. Emphasis is laid upon the word "void" in section 54 (1) of the Act, but the said word in the context can only mean voidable, for it is made void only against the Receiver and requires to be annulled by the Court. It follows from the aforesaid premises that such a transfer is valid till annulled in the manner prescribed by the provisions of the Provincial Insolvency Act.

The legal effect of annulling a transfer under section 53 of the Act was considered by a Division Bench of the Madras High Court in *The Official Receiver, Coimbatore* v. *Palaniswami Chetti*[1]. In that decision, Devadoss, J., observed as under at page 758:

" But till such a declaration is made by the Insolvency Court under section 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property."

Wallace, J., elaborated thus, at page 764 :

" Section 53 implies an attack by the Official Receiver on behalf of the general body of creditors and the remedy which he is entitled to get on proving his case is that the transfer is voidable against him and may be annulled by the Court........... It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver, and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs *prima facie* to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it. ....The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under section 53, and the mortgagee is entitled therefore to enforce his mortgage against the mortgagor except so far as proceedings under section 53 may have held the property mortgaged as assets of the mortgagor at the disposal of the general body of creditors ".

1. (1925) 49 M.L.J. 203 : I.L.R. 48 Mad. 750.

The observations of the learned Judges establish two propositions : (i) that the transaction *inter se* between the debtor and transferee is good ; and (ii) it is not binding on the Official Receiver so far as it is necessary to protect the interests of the creditors. The decision in *Amir Ahmad* v. *Saiyid Hasan*[1] is also one laying down the legal effect of section 53 of the Act. The learned Judges made the following observations in that case, at page 903 :

"It seems quite clear that if a transfer made by a debtor is wholly fictitious and bogus and no interest in the property passes to the transferee, then the transfer is void *ab initio* and subsequent transferees can never be protected because the foundation of their title does not exist .... On the other hand, if the transfer made by the debtor was not wholly fictitious and bogus but the intention of the parties was that property should in fact pass to the transferee, then the result would depend on whether the transferee was a purchaser in good faith and for valuable consideration or not. The transfer for the time being is valid, though it is voidable, at the option of the Receiver, and it is discretionary with the Court to annul it under section 53 of the Provincial Insolvency Act."

The said observations will apply *mutatis mutandis* to a situation under section 54 of the Act. Indeed, a Division Bench of the Nagpur High Court in *Rukhmanbai* v. *Govindram*[2] in the context of section 54 of the Act, stated to the same effect thus at page 275 :

"The wording of the section (section 54) thus very clearly indicates that a transfer of the nature mentioned therein is voidable as against the Receiver and is not void *ab initio* and may be annulled by the Court. ....It is thus clear from the section that till the transfer is actually annulled by the Court it remains a valid transaction."

The aforesaid discussion yields the following result: (1) a transfer by a debtor of his property before insolvency in favour of a creditor with a view to giving him preference over other creditors conveys a valid title to the transferee ; (2) under circumstances mentioned in section 54 of the Act, it is voidable against the Receiver; (3) when it is annulled by the Court on the ground of fraudulent preference, the property vests in the Official Receiver, who can administer it in the interest of the creditors ; and (4) even after the transfer is annulled, it continues to be good between the transferor and transferee, and in a contingency of any balance remaining of the sale proceeds after the creditors are fully paid, the transferee would be entitled to the same.

Two lines of decisions have been relied upon by the learned counsel for the appellants. The first one holds that in the case of conflicting claims to an estate, the claimant ultimately declared to be the owner thereof by the final Court cannot rely to save the bar of limitation, upon a petition filed by the rival claimant to execute the decree pertaining to the estate at the time the title was in his favour ; and the other decides that, when a transfer is set aside on the ground of fraudulent preference, the Official Receiver can claim to recover mesne profits from the transferee of the property of an insolvent from the date of the transfer. The first line of decisions turns upon the principle that a defeated claimant had no title to the property at the time he filed the application, for the effect of the final decree is that the said claimant had no title at any time, and the second line of decisions is founded on some equitable doctrine. There are also decisions taking the contrary view. It is not necessary in this case either to go into that question or attempt to resolve the conflict. As I have held that in the case of a transfer in fraud of creditors or by fraudulent preference, the transfer is good till set aside by the Court, the transferee would have title to file the execution petition before the transfer was set aside.

The third contention of the learned counsel for the appellants is a weak one. It is said that the Official Receiver does not claim under Meenakshi Achi, and, therefore, he cannot rely upon the execution petition filed by her to save the bar of limitation. There is a fallacy underlying this argument. The question for decision is not whether the Official Receiver claims under Meenakshi Achi but, whether the execution petitions filed by her were in accordance with law. If, as I held, at the time the previous execution petitions were filed, Meenakshi Achi had a valid title to execute the decree, the execution petitions filed by her would certainly be in accordance with law within the meaning of Article 182 (5) of the Indian Limitation Act. I, therefore, reject this contention.

1. (1935) I.L.R. 57 All. 900. 2. I.L.R. (1946) Nag. 273.

In view of the aforesaid conclusions arrived at by me, the last two contentious based on payments of instalments do not arise for consideration.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. R. DAS, *Chief Justice*, N.H. BHAGWATI AND M. HIDAYATULLAH, JJ.

Messrs. Godrej & Co. .. *Appellants**

v.

The Commissioner of Income-tax, Bombay City, Bombay .. *Respondent.*

Income-tax Act (XI of 1922)—Lump sums received by managing agents in lieu of the higher percentage of profits provided as remuneration of period of managing agency—If capital or revenue receipt liable to tax.

A managing agency yielding a remuneration calculated at the rate of 20 per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent. of the profits provided under a subsequent agreement varying the earlier agreement. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided the lump sum of Rs. 7,50,000 (paid by the managed company as compensation, for releasing the company from the term as to 20 per cent. remuneration contained in the original agency agreement) must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency. The sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the managing agency for the rest of the term of agency and, therefore a capital expenditure and so far as the managing agency was concerned it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore a capital receipt not liable to tax.

Case-law reviewed.

Appeal from the Judgment and Order, dated the 11th September, 1953, of the Bombay High Court in Income-tax Reference No. 23 of 1953.

A. V. Viswanatha Sastri, Senior Advocate (*S. N. Andley* and *J. B. Dadachanji*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Appellants.

M. C. Setalvad, Attorney-General for India (*K. N. Rajagopal Sastri* and *D. Gupta*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das, C.J.—This is an appeal from the Judgment and Order of the High Court of Bombay delivered on September 11, 1953, on a reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, whereby the High Court answered the referred question in the affirmative and directed the appellant to pay the costs of the respondent.

The appellant, which is a registered firm and is hereinafter referred to as " the assessee firm " was appointed the managing agent of Godrej Soaps Limited (hereinafter called the "managed company"). It has been working as such managing agent since October, 1928, upon the terms and conditions recorded originally in an agreement, dated October 28, 1928, which was subsequently substituted by another agreement, dated December 8, 1933, (hereinafter referred to as " the Principal Agreement"). Under the Principal Agreement the assessee firm was appointed managing agent for a period of thirty years from November 9, 1933. Clause 2 of that Agreement provided as follows :—

" The Company shall during the subsistence of this agreement pay to the said firm and the said firm shall receive from the company the following remuneration, that is to say :

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* Civil Appeal No. 183 of 1956. 4th August, 1959.

(*a*) A commission during every year at the rate of twenty per cent. on the net profits of the said company after providing for interest on loans, advances and debentures (if any) working expenses, repairs, outgoings and depreciation but without any deduction being made for income-tax and super-tax and for expenditure on capital account or on account of any sum which may be set aside in each year out of profits as reserve fund.

(*b*) In case such net profits of the Company after providing for interest on loans, advances and debentures (if any), working expenses, depreciation, repairs and outgoings and after deduction therefrom the commission provided for by sub-clause (*a*) shall during any year exceed a sum of rupees one lac the amount of such excess over rupees one lac up to a limit of rupees twenty-four thousand.

(*c*) In case such net profits of the Company after providing for interest on loans, advances, and debentures (if any) working expenses, depreciation, repairs and outgoings and after also deducting therefrom the commission provided for by sub-clause (*a*) shall during any year exceed a sum of rupees one lac and twenty-four thousand one half of such excess over rupees one lac and twenty-four housand shall be paid to the firm and the other half to the shareholders."

Some of the shareholders and directors of the managed company felt that the scale of remuneration paid to the assessee firm under clause (2) of the Principal Agreement was extraordinarily excessive and unusual and should be modified. Accordingly negotiations were started for a reduction of the remuneration and, after some discussion, the assessee firm and the managed company arrived at certain agreed modifications which were eventually recorded in a special resolution passed at the extraordinary general meeting of the managed company held on October 22, 1946. That resolution was in the following terms :—

" Resolved that the agreement arrived at between the managing agents on the one hand and the directors of your Company on the other hand, that the managing agents, in consideration of the Company paying Rs. 7,50,000 as compensation, for releasing the Company from the onerous term as to remuneration contained in the present managing agency agreement should accept as remuneration for the remaining term of their managing agency ten per cent. of the net annual profits of the Company as defined in section 87-C, sub-section (3) of the Indian Companies Act in lieu of the higher remuneration to which they are now entitled under the provisions of the existing managing agency agreement be and the same is hereby approved and confirmed.

Resolved that the Company and the managing agents do execute the necessary document modifying the terms of the original managing agency agreement in accordance with the above agreement arrived at between them. Such document be prepared by the Company's solicitors and approved by the managing agents and the directors shall carry the same into effect with or without modification as they shall think fit."

The agreed modifications were thereafter embodied in a Supplementary Agreement made between the assessee firm and the managed company on March 24, 1948. After reciting the appointment of the assessee firm as the Managing Agent upon terms contained in the Principal Agreement and further reciting the agreement arrived at between the parties and the resolution referred to above, it was agreed and declared as follows :

" 1. That the remuneration of the Managing Agents as from the 1st day of September, 1946, shall be ten per cent. of the net annual profits of the Company as defined in section 87-C, sub-section (3) of the Indian Companies Act, 1913, in lieu of the higher remuneration as provided in the above recited clause (2) of the Principal Agreement.

2. Subject only to the variations herein contained and such other alterations as may be necessary to make the Principal Agreement consistent with these presents the principal agreement shall remain in full force and effect and shall be read and construed and be enforceable as i the terms of these presents were inserted therein by way of substitution."

The sum of Rs. 7,50,000 was paid by the managed company and received by the assessee firm in the calendar year 1947 which was the accounting year for the assessment year 1948-49.

In the course of the assessment proceedings for the assessment year 1948-49, it was contended by the departmental representative, (i) that though the payment of Rs. 7,50,000 had been described as compensation, the real object and consideration for the payment was the reduction of remuneration, (ii) that that being the character of payment, it was a lump sum payment in consideration of the variation of the terms of employment and was, therefore, not a capital receipt but was a revenue receipt, and (iii) that there was, in fact, no break in service and the payment was made in course of the continuation of the service and, therefore, represented a revenue receipt

of the managing agency business of the assessee firm. The assessee firm, on the other hand, maintained that the sum of Rs. 7,50,000 was a payment made by the managed company to the assessee firm wholly in discharge of its contingent liability to pay the higher remuneration and in order to discharge itself of an onerous contingent obligation to pay higher remuneration and it was, therefore, a capital expenditure incurred by the managed company and a capital receipt obtained by the assessee firm and was as such not liable to tax.

The Income-tax Officer treated the sum of Rs. 7,50,000 as a revenue receipt in the hands of the assessee firm and taxed it as such. On appeal this decision was confirmed by the Appellate Assistant Commissioner and thereafter, on further appeal, was upheld by the tribunal by its order dated July 23, 1952. At the instance of the assessee firm the Tribunal, under section section 66 (1) of the Act, made a reference to the High Court raising the following question of law :—

> " Whether on the facts and in the circumstances of the case the sum of Rs. 7,50,000 is a revenue receipt liable to tax ".

The said reference was heard by the High Court and by its judgment, pronounced, on September 11, 1953, the High Court answered the referred question in the affirmative and directed the assessee firm to pay the costs of the reference. The High Court, however, gave to the assessee firm a certificate of fitness for appeal to this Court and that is how the appeal has come before us.

As has been said by this Court in *Coimmsioner of Income-tax and Excess Profits Tax, Madras* v. *The South India Pictures Ltd.*[1]

> " It is not always easy to decide whether a particular payment received by a person is his income or whether it is to be regarded as his capital receipt ".

Eminent Judges have observed that "income" is a word of the broadest connotation and that it is difficult, and perhaps impossible, to define it by any precise general formula. Though in general the distinction between an income and a capital receipt is well recognised, cases do arise where the item lies on the borderline and the problem has to be solved on the particular facts of each case. No infallible criterion or test has been or can be laid down and the decided cases are only helpful in that they indicate the kind of consideration which may relevantly be borne in mind in approaching the problem. The character of payment received may vary according to the circumstances. Thus, the amount received as consideration for the sale of a plot of land may ordinarily be capital ; but if the business of the recipient is to buy and sell lands, it may well be his income. It is therefore, necessary to approach the problem keeping in view the particular facts and circumstances in which it has arisen.

There can be no doubt that by paying this sum of Rs. 7,50,000 the managed company has secured for itself a release from the obligation to pay a higher remuneration to the assessee firm for the rest of the period of managing agency covered by the Principal Agreement. *Prima facie*, this release from liability to pay a higher remuneration for over 17 years must be an advantage gained by the managed company for the benefit of its business and the immunity thus obtained by the managed company may well be regarded as the acquisition of an asset of enduring value by means of a capital outlay which will be a capital expenditure according to the test laid down by Viscount Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*[2], referred to in the judgment of this Court in *Assam Bengal Cement Co., Ltd.* v. *Commissioner of Income-tax*[3]. If the sum of Rs. 7,50,000 represented a capital expenditure incurred by the managed company, it should, according to learned counsel for the assessee firm, be a capital receipt in the hands of the assessee firm, for the intrinsic characterisics of capital sums and revenue items respectively are essentially the same for receipts as for expenditure. (*See* Simon's Income-tax, II Edn., Vol. 1, para. 44, p. 31),

1. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.) 21 : (1956) An. W.R. (S.C.) 215 : (1956) S.C.R. 223, 228.

2. (1925) 10 Tax Cas. 155.

3. (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.) 118 : (1955) 1 S.C.R. 972.

But, as pointed out by the learned author in that very paragraph, this cannot be an invariable proposition, for there is always the possibility of a particular sum changing its quality according as the circumstances of the payer or the recipient are in question. Accordingly the learned Attorney-General appearing for the respondent contends that we are not concerned in this appeal with the problem, whether, from the point of view of the managed company, the sum represented a capital expenditure or not but that we are called upon to determine whether this sum represented a capital receipt in the hands of the assessee firm.

In the Resolution adopted by the managed company as well as in the recitals set out in the Supplementary Agreement this sum has been stated to be a payment "as compensation for releasing the company from the onerous term as to remuneration contained " in the Principal Agreement. It is true, as said by the High Court and as reiterated by the learned Attorney-General, that the language used in the document is not decisive and the question has to be determined by a consideration of all the attending circumstances ; nevertheless, the language cannot be ignored altogether but must be taken into consideration along with other relevant circumstances.

This sum of Rs. 7,50,000 has undoubtedly not been paid as compensation for the termination or cancellation of an ordinary business contract which is a part of the stock-in-trade of the assessee and cannot, therefore, be regarded as income, as the amounts received by the assessee in *The Commissioner of Income-tax and Excess Profits Tax* v. *The South India Pictures Ltd.*[1] altogether and in *The Commissioner of Income-tax, Nagpur* v. *Rai Bahadur Jairam Valji*[2], had been held to be. Nor can this amount be said to have been paid as compensation for the cancellation or cessation of the managing agency of the assessee firm, for the managing agency continued and, therefore, the decision of the Judicial Committee of the Privy Council in *The Commissioner of Income-tax* v. *Shaw Wallace and Co.*,[3] cannot be invoked. It is, however, urged that for the purpose of rendering the sum paid as compensation to be regarded as a capital receipt it is not necessary that the entire managing agency should be acquired. If the amount was paid as the price for the sterilisation of even a part of a capital asset which is the framework or entire structure of the assessee's profit-making apparatus, then the amount must also be regarded as a capital receipt, for, as said by Lord Wrenbury in *Glenboig Union Fireclay Co. Ltd* v. *The Commissioners of Inland Revenue*[4], " what is true of the whole must be equally true of part "—a principle which has been adopted by this Court in *The Commissioner of Income-tax, Hyderabad-Deccan* v. *Messrs. Vazirn Sulta and Sons*[5]. The learned Attorney-General, however, contends that this case is not governed by the decisions in *Shaw Wallace's case*[3], or *Messrs. Vazir Sultan and Sons' case*[5], because in the present case there was no acquisition of the entire managing agency business or sterilisation of any part of the capital asset and the business structure or the profit-making apparatus, namely, the managing agency, remains unaffected. There is no destruction or sterilisation of any part of the business structure. The amount in question was paid in consideration of the assessee firm agreeing to continue to serve as the managing agent on a reduced remuneration and, therefore, it bears the same character as that of remuneration and, therefore, a revenue receipt. We do not accept this contention. If this argument were correct, then, on a parity of reasoning, our decision in *Messrs. Vazir Sultan and Son's case*[5], would have been different, for, there also the agency continued as before except that the territories were reduced to their original extent. In that case also the agent agreed to continue to serve with the extent of his field of activity limited to the State of Hyderabad only. To regard such an agreement as a mere variation in the terms of remuneration is only to take a superficial view of the matter and to ignore the effect of such variation on what has been called the profit-making apparatus. A managing agency yielding a remuneration calculated at the rate of 20

1. (1956) S.C.J. 479: (1956) 2 M.L.J. (S.C). 21: (1956) An.W.R. (S.C.) 215 : (1956) S.C.R. 223, 228.
2. (1959) 35 I.T.R. 148.
3. (1932) L.R. 59 I.A. 206: 63 M.L.J. 124
4. (1922) 12 Tax Cas. 427.
5. Civil Appeal No. 346 of 1957 decided on. 20th March, 1959.

per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent. of the profits. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided, the sum of Rs. 7,50,000 must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency just as the amounts paid in *Glenboig's case*[1] or *Messrs. Vazir Sultan's case*[2], were held to be. This case is also very nearly covered by the majority decision of the English House of Lords in *Hunter* v. *Dewhurst*[3]. It is true that in the later English cases of *Prendergast* v. *Cameron*[4], and *Wales* v. *Tilley*[5], the decision in *Hunter* v. *Dewhurst*[3], was distinguished as being of an exceptional and special nature but those later decisions turned on the words used in Rule I of Schedule E to the English Act. Further, they were cases of continuation of personal service on reduced remuneration simpliciter and not of acquisition, wholly or in part, of any managing agency viewed as a profit-making apparatus and consequently the effect of the agreements in question under which the payment was made upon the profit-making apparatus did not come under consideration at all. On a construction of the agreements it was held that the payments made were simply remuneration paid in advance representing the difference between the higher rate of remuneration and the reduced remuneration and as such a revenue receipt. The question of the character of the payment made for compensation for the acquisition, wholly or in part, of any managing agency or injury to or deterioration of the managing agency as a profit-making apparatus is covered by our decisions hereinbefore referred to. In the light of those decisions the sum of Rs. 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the assessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above.

In the light of the above discussion it follows, therefore, that the answer to the referred question should be in the negative. The result, therefore, is that this appeal is allowed, the answer given by the High Court to the question is set aside and the question is answered in the negative. The appellant must get the costs of the reference in the High Court and in this Court.

Appeal allowed.

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1. (1922) 12 Tax Cas. 427.
2. Civil. Appeal No. 346 of 1957, decided on 20th March, 1959.
3. (1932) 16 Tax Cas. 605.
4. (1940) 23 Tax Cas. 122.
5. (1942) 25 Tax Cas. 136.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Sitaram Ramcharan etc., etc. .. *Appellants**

v.

M. N. Nagrashana, Authority under Payment of Wages Act, Ahmedabad, and others .. *Respondents.*

Payment of Wages Act (IV of 1939), section 15 (2) Second proviso—Scope—Delay in preferring claim for overtime wages—When can be condoned—Ignorance of law—If sufficient cause.

The Second proviso to section 15 (2) of the Payment of Wages Act is in substance similar to the provision in section 5 of the Limitation Act. In dealing with the question of condoning delay under those provisions the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time and the explanation has to cover the whole of the period of delay. Where the applicant failed to establish sufficient cause for his inaction between the date when the law was clarified by a decision of a tribunal and the date on which the application claiming overtime wages was filed the delay cannot be condoned.

Quaere :—Whether ignorance of law can be said to constitute sufficient cause within the meaning of the Proviso to section 15 (2) of the Payment of Wages Act ?

Appeals from the Judgment and Order, dated the 22nd June, 1954, of the Bombay High Court in Special Civil Applications Nos. 285, 348, 1214 to 1221 and 2356 to 2365 of 1954.

N. V. Phadke and *S. S. Shukla* and *Mrs. E. Udayaratnam*, Advocates for Appellants.

M. C. Setalvad, Attorney-General for India, (*J. B. Mehta*, Advocate and *J. B. Dadachanji*, *S. N. Andley* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.*, with him) for Respondent No. 2 (in C. As. Nos. 9-14, 16-20 and 22-28).

B. K. B. Naidu and *I. N. Shroff*, Advocates for Respondent No. 2 (In Civil Appeal No. 15 of 1957.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This group of consolidated appeals has come before this Court with a certificate granted by the High Court at Bombay under Article 133 of the Constitution; the certificate shows that according to the High Court the amount of the value of the subject-matter in dispute involved in these consolidated appeals exceeds Rs. 20,000 and they raise a substantial question of law.

The 385 appellants concerned in these 20 appeals are employees in the Watch and Ward department of various textile mills in Ahmedabad. They had filed 20 applications between July 22, 1953, to October 6, 1953, before the authority under the Payment of Wages Act (hereinafter called the authority) and had claimed overtime wages for the period between January, 1951, to December, 1951, and June-July, 1953. These applications were accompanied by another set of 20 applications in which they prayed for condonation of delay made in putting forward the claim for overtime wages under the second proviso to section 15 (2) of the Payment of Wages Act (IV of 1936) (hereinater called the Act). The authority considered the case made out by the appellants for condonation of delay and held that they had failed to prove sufficient cause for not making their applications within the prescribed period. The appellants then moved the High Court at Bombay under Articles 226 and 227 of the Constitution. These applications also failed and were dismissed. Then the appellants moved the High Court for a certificate, and a certificate was granted to them. It is with this certificate that they have come to this Court.

It is necessary at first to set out the circumstances under which the appellants have made their claim for overtime wages in their present applications. Section 59 of the Factories Act, 1948 (LXIII of 1948) which came into force on September 23, 1948, provides for the payment of extra wages for overtime to persons who are workers

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* Civil Appeals Nos. 9 to 28 of 1957. 25th September, 1959.

as defined by section 2 (1) of the Act. It is common ground that the appellants are not workers under the said section ; and so they did not claim any of the benefits conferred on workers by the provisions of the Factories Act. The Bombay Shops and Establishments Act, 1948 (Bombay Act LXXIX of 1948) came into force in the State of Bombay on January 11, 1949; and it is not denied that the appellants are employees under section 2 (6) of the said Act. Section 70 of this Act provides for the application of section 59 of the Factories Act to all employees working in factories like the appellants, but the words used in section 70 are not very clear and the effect of its provisions was a matter of doubt which was finally resolved by the decision of this Court in the case of *Shri B.P. Hira, Works Manager, Central Railway, Parel, Bombay, etc.,* v. *Shri C. M. Pradhan, etc.*[1], on May 8, 1959. It is because the true effect of this section was not appreciated by the appellants that the present difficulty has arisen.

Not knowing that they were entitled to the benefits of the relevant provisions of the Factories Act by virtue of section 70 of the Bombay Shops and Establishments Act, the representative union of the appellants raised an industrial dispute by a notice on September 20, 1949, claiming some of the amenities provided by the Factories Act (Ref. (IC) No. 192 of 1949). While delivering its award on this reference on November 25, 1950, the Full Bench of the Industrial Tribunal observed that the employees did not appear to be covered by the Factories Act and on that basis it awarded to them a nine-hour day, two holidays per month and a limited provision for overtime wages. It is clear that this award proceeded on the assumption that the relevant provisions of the Factories Act did not apply to the appellants. On May 2, 1952, the appellate decision delivered by the Chief Judge of the Court of Small Causes, in the case of *Ruby Mills*[2], however, construed section 70 of the Bombay Shops and Establishments Act and held that the employees falling under the provisions of the said section were entitled to claim overtime wages under section 59 of the Factories Act. In other words, this decision for the first time properly construed section 70 of the Bombay Act and held that the said section in substance extended the provisions of section 59 of the Factories Act to the employees covered by section 70.

When the appellants' union came to know about this decision it moved the Minister of Labour, Bombay, on October 30, 1952 and requested him to persuade the Ahmedabad mills to extend the benefits of the Factories Act to their Watch and Ward staff; on November 1, 1952, the union received a reply from the Minister stating that he had drawn the attention of the Factori s Department to the judgment in the *Ruby Mills' case*[2]. Thereafter the secretary of the union requested the Chief Inspector of Factories, Ahmedabad, to enforce the above decision in Ahmedabad. Subsequent correspondence followed between the union, the factory authorities and the Mill-Owners' Association, Ahmedabad. In May, 1953, the Mill-Owners' Association accepted the position that the appellants were covered by the Factories Act, and in July, 1953, the appellants were for the first time paid for overtime at the rate provided under the Factories Act. Some mills paid the overtime wages with effect from January, 1953; some from May, 1953 and some from July, 1953.

In August, 1953, the secretary of the new union, which the appellants had joined in the meanwhile, wrote to the employers requesting them to pay overtime wages for the prior period ; and when this request did not receive a sympathetic response from the employers the present applications were filed before the authority making a claim for overtime wages for the period already mentioned.

In their applications for the condonation of delay the appellants alleged that they had *bona fide* believed that neither the Factories Act nor the Bombay Shops and Establishments Act applied to the Watch and Ward staff, and so they had moved the Industrial Court for redress of their grievances. The step thus taken by the appellants shows that in asserting their rights they were exercising due diligence and care. The employers conceded the position that the appellants were entitled to claim overtime wages only in May 1953, and then the appellants tried to negotiate with

1. Civil Appeals Nos. 131 to 304 of 1957.
2. *Vide* Bombay Labour Gazette, January 1935, Vol. 32, No. 5, page 521.

them for the payment of the overtime wages claimed in the present applications. It is on these grounds that the appellants prayed that the delay made in presenting the claim should be condoned.

This claim was resisted by the employers on two grounds ; it was urged by them that the main ground alleged by the appellants for claiming condonation of delay amounted to a plea of ignorance of law and that ignorance of law cannot be a sufficient cause under the relevant proviso. It was also contended that no sufficient or satisfactory reason had been given by the appellants for the delay made by them in filing the present applications subsequent to May 2, 1952, when section 70 of the Bombay Act had been authoritatively considered by the appellate Court in the case of *Ruby Mills*[1], and so the employers argued that the appellants were not entitled to ask for condonation of delay.

The authority upheld both these contentions raised by the employers. It considered the judicial desisions cited before it and held that even if the appellants were ignorant of the rights that they got under section 70 of the Bombay Act such ignorance of law cannot be said to be a sufficient cause. It also examined the conduct of the appellants subsequent to the date of the decision in the *Ruby Mills' case*[1] and held that the said conduct did not justify the appellants' claim that they were acting *bona fide* and with due diligence in asserting their rights. In dealing with this latter question the authority observed that the appellants did not specify when they came to know about the decision in the case of *Ruby Mills*[1], and no satisfactory explanation had been given by them as to why, immediately after coming to know of the said decision, they did not move the authority. The authority also examined the correspondence that passed between the parties after the decision in the *Ruby Mills case*[1], and found that the appellants were even then claiming the benefit of the Factories Act prospectively and not retrospectively. In the absence of any affidavit explaining the conduct of the appellants after May 2, 1952, when the *Ruby Mills case*[1], was decided, the authority came to the conclusion that the inaction of the appellants was not at all satisfactorily explained, and so no sufficient cause could be said to have been shown by them to justify the condonation of delay. As a result of these two findings the authority refused to excuse delay, and so the claim made by the appellants for overtime wages for a period beyond the prescribed period of limitation was rejected.

When this decision was challenged by the appellants before the High Court by their petitions under Articles 226 and 227 apparently the only point urged before the High Court was that the authority was in error in holding that an error of law cannot be a sufficient cause under the relevant proviso to section 15 (2) of the Act. It does not appear that the attention of the High Court was drawn to the second finding made by the authority, and so, that aspect of the matter has not been considered in the judgment of the High Court. Dealing with the point raised before it the High Court agreed with the view taken by the authority, and held that ignorance of law cannot constitute a sufficient cause. " Ignorance of law ", observed the High Court,

> "is ignorance of the rights of a party which the law confers upon him, whereas mistake of law is mistake in establishing those rights by, for instance, going to one forum instead of another.'"

The High Court has observed that in cases where there is a mistake of law Courts have almost uniformly taken the view that the time taken up by asserting in a wrong Court or a wrong forum should be excused, and in coming to this conclusion they had been largely influenced by the principle underlying section 14 of the Limitation Act. That is how the petitions filed by the appellants in the High Court were dismissed.

Before dealing with the merits of the contentions raised by Mr. Phadke in the present appeals it is necessary to read the relevant provisions of section 15 of the Act. Section 15 (1) provides for the appointment of the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in

1. *Vide* Bombay Labour Gazette, January, 1953, Vol. 32, No. 5, page 521.

payment of the wages of persons employed or paid in that area. Sub-section (2) provides *inter alia* that if any deduction has been made from the wages of an employed person contrary to the provisions of the Act or any payment of wages has been delayed, such person may apply to such authority for a direction under sub-section (3). It is under this sub-section that the present applications have been made. The First proviso to sub-section (2) prescribes limitation, and says that every such application shall be presented within six months from the date on which the cause of action accrued. It is the Second proviso with which we are directly concerned in the present appeals. This proviso lays down further that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period. The pincipal question which has been agitated in the High Court and before the authority was whether ignorance of law can be said to constitute sufficient cause within the meaning of this proviso.

Mr. Phadke contends that this proviso confers wide discretion on the authority and Legislature has deliberately not circumscribed or regulated in any manner the exercise of the said discretion. He concedes that it has to be exercised judicially but he protests against the imposition of any rigid rule, or, as he called it, self-denying ordinance, by which the authority would invariably refuse to treat ignorance of law as falling within the expression "sufficient cause" under the proviso. According to him there is no rule in India that ignorance of law cannot be a sufficient cause for explaining the delay made in instituting legal proceedings; and he strongly urged that even if such a rule applies to ordinary legal proceedings it would be singularly inappropriate in the interpretation of the provisions of welfare legislation like the Act.

In support of this argument Mr. Phadke has invited our attention to the decision of the House of Lords in *Hyman and another* v. *Rose*[1], as well as the decision of this Court in *Namdeo Lokman Lodhi* v. *Narmadabai and others*[2]. Both these decisions dealt with the question of the discretion vested in the Courts to grant relief against forfeiture, and Mr. Phadke's argument was that the relevant words used in that behalf in conferring discretion on the Courts have been construed in their widest denotation and are similar to those in the proviso with which we are concerned ; and so the same construction should be adopted in interpreting it. He has also strongly relied on the decision of the Privy Council in *Brij Indar Singh* v. *Kanshi Ram and others*[3], where their Lordships have considered the trend of judicial decisions in India which interpreted section 5 of the Indian Limitation Act, 1908, and have observed that there appeared to be a uniform practice in the Indian High Courts under which a mistake in law was in proper cases treated as sufficient cause for execusing delay. " Now if the matter were entirely open", said Lord Dunedin in delivering the judgment of the Board,

> " inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under section 5, there would be a good deal to be said in argument in favour of making the rule universal........But the matter is not open. To interfere with a rule which after all is only a rule of procedure which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not purpose so to interfere."

Mr. Phadke argues that this decision is an authority for the proposition that in a proper case a mistake of law or ignorance of law may constitute a sufficient cause under section 5 of the Limitation Act, and, according to him, the same principle should apply in construing the proviso in question. We do not propose to deal with this argument because, as we will presently point out, we have come to the conclusion that the appellants would fail even if we were to uphold Mr. Phadke's present contention.

As we have already noticed the authority has held against the appellants on two grounds, one that ignorance of law cannot be a sufficient cause, and second that,

1. L.R. (1912) A.C. 623.
2. (1953) S.C.J. 306 : (1953) 1 M.L.J. 715 : (1953) S.C.R. 1009 at 1027.
3. (1917) L.R. 44 I.A. 218 : 33 M.L.J. 486 (P.C.).

even if it was, in fact, the appellants had not explained the delay made by them in making the present applications after they knew of the decision in the case of *Ruby Mills*[1] on May 2, 1952. This latter conclusion is a finding on a question of fact and its propriety or validity could not have been challenged before the High Court and cannot be questioned before us in the present appeals. Unfortunately it appears that the attention of the learned Judges of the High Court was not drawn to this finding; otherwise they would have considered this aspect of the matter before they proceeded to deal with the interesting question of law raised before them.

Mr. Phadke fairly conceded that he could not effectively challenge the finding of the authority that no satisfactory explanation had been given for the delay in question. He, however, argued that the said finding would not affect the final decision because, according to him, once it is held that ignorance of law can be a sufficient cause, then the period until May 2, 1952, would be covered by the appellant's ignorance about the true scope and effect of the provisions of section 70 of the Bombay Shops and Establishments Act. This position may be conceded. It is true that the true effect of the said section was not appreciated by either the workmen and their union or the employers or the authorities under the Factories Act, or even by the industrial Courts. But the question still remains whether the appellants are not required to explain the delay made by them after May 2, 1952. Mr. Padke says that it is not necessary for his clients to explain this delay. His argument is that what the relevant proviso really means is that if sufficient cause has been shown for not making the application within the prescribed period of six months then the application can be made any time thereafter. The statutory bar created by the prescribed limitation is removed once it is shown that there was sufficient cause for not making the application within the said period ; and once that bar is removed, there is no further question of limitation and the applicant cannot be called upon to explain the subsequent delay. That is the effect of the argument urged by Mr. Phadke on the relevant proviso.

This argument is substantially founded on the decision of the Court of Appeal in *Lingley* v. *Thomas Firth & Sons, Ltd.*[2]. In that case the Court had to construe the words "reasonable cause" used in proviso (*b*) to section 2, sub-section (1) of the Workmen's Compensation Act, 1906 (6 Edw. 7, C. 58). Section 2 (1) prescribes a limitation of six months for the making of a claim for compensation arising out of an accident caused to the workman falling within its purview, and proviso (*b*) lays down that the

> " failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom or other reasonable cause."

In the case of *Lingley*[2], the claim had been admittedly made beyond the period of six months and within a couple of months thereafter an application for arbitration for compensation was filed. The County Court Judge was satisfied that there was reasonable cause within section 2, sub-section (1) for the applicant's failure to make a claim within the prescribed period, and he held that when once the bar to the proceedings had been surmounted by the establishment of reasonable cause, there was no further limited period within which the claim must be made. Accordingly compensation was awarded to the applicant. The employer appealed against this award and his appeal was allowed. The Court of Appeal reversed the finding of the County Court Judge on the first point and held that for the applicant's failure to make the claim within six months she had not shown any reasonable cause, and that naturally led to the reversal of the award. Even so, in considering the question of the construction of section 2 (1), proviso (*b*), the learned Judges observed that if sufficient cause had been established by the applicant she would have succeeded in obtaining compensation, because they agreed that, if the bar imposed by the statutory period of six months prescribed for the making of the claim had been raised, the claim of the applicant could not be subjected to any further bar of limitation. It is this view on which

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1. Vide *Bombay Labour Gazette*, January, 1953, Vol. 32, No. 5, P. 521.
2. L.R. (1921) 1 K.B. 655.

Mr. Phadke relies, and he contends that the same principle should be applied in construing the relevant proviso to section 15 of the Act. In this connection Mr. Phadke has invited our attention to three Indian decisions—*J. Hogan* v. *Gafur Ramzan*[1], *Salamat* v. *Agent, East Indiam Railway*[2], and *Kamarhatti Co., Ltd.* v. *Abdul Samad*[3]. These decisions were concerned with claims for compensation made under section 10 of the Workmen's Compensation Act, VIII of 1923, the first two under section 10 as it stood prior to its amendment in 1938, and the last one under the said section as it was amended in 1938. It may be added that all the three decisions purport to adopt the view taken by the Court of Appeal in the case of *Lingley*[4].

Now in order to appreciate the effect of the decision in the case of *Lingley*[4] it would be relevant to emphasise that in that case the Court of Appeal was really giving effect to an earlier decision of the House of Lords in *Powell* v. *The Main Colliery Co., Ltd.*[5], and, as the judgments of all the learned Judges indicate, they were following the said decision with some reluctance. In the case of *Powell*[5], the House of Lords had held that the claim for compensation specified in section 2 (1) of the English Act does not mean initiation of the proceedings before the tribunal by which compensation is to be assessed, but a notice of claim of compensation sent to the workman's employer. In other words, according to that decision, the limitation of six months prescribed by section 2 (1) applies to the notice of claim which a workman has to give to his employer; it had no reference to the proceedings which a workman would institute before the tribunal claiming to recover the said compensation. The notice of claim had to be served on the employer within six months after the date of the accident, and after serving such notice proceedings had to be initiated before the tribunal claiming compenstion. The effect of the two English decisions, therefore, is that if a workman shows sufficient cause for the delay made by him in serving the notice of claim on the employer there was no question of calling upon him to explain any further delay made by him in instituting the proceedings before the tribunal for the recovery of compensation. In fact, for the institution of such proceedings there was no statutory limitation at all.

Let us now tern to section 10 of our Wokmen's Compensation Act. Section 10 (1) as it originally stood prescribed a period of six months for the making of the claim for compensation. It also required that notice of the accident had to be given as soon as practicable after the happening thereof and before the workman had voluntarily left the employment in which he was injured. The second proviso to section 10 (1) lays down that the Commissioner may admit and decide any claim to compensation notwithstanding that the notice had not been given or the claim had not been instituted in due time as provided by the sub-section if he is satisfied that the failure so to give notice or to institute the claim as the case may be was due to sufficient cause. It appears that in construing the material terms of this proviso it was thought that the position under the proviso was similar to the position under the proviso (*b*) of section 2 (1) of the English Act. It is open to argument whether that is really so ; but, in any case, after section 10 was amended in 1938 the position is clearly different and distinguishable from the position of the English section. The relevant proviso under the amended section lays down that a Commissioner may entertain and decide any claim for compensation in any case notwithstanding that notice has not been given, or the claim has not been preferred before it in due time as provided by section 10, sub-section (1) if he is stisfied that the failure so to give the notice or prefer the claim as the case may be was due to sufficient cause. It is significant that section 10 (1) requires the notice of accident to be given as soon as practicable and the claim to be preferred before the Commissioner within six months. This period has subsequently been enlarged to a period of one year ; but that is another matter. Thus the position under section 10 as amended clearly is that the six months' limitation has been prescribed for

1. 35 Bom.L.R. 1143.
2. I.L.R. (1938) 2 Cal. 52 at 58.
3. (1952) 1 L.L.J. 490 at 492.
4. L.R. (1921) 1 K.B. 655.
5. L.R. (1900) A.C. 366.

preferring the application for compensation before the Commissioner; and so there can be no analogy between the limitation thus prescribed and the limitation prescribed by section 2. (1) of the English Act. With respect, we may add that in the case of *Kamarhatti Co., Ltd.*[1], where the learned Judges held that the decision in *Lingley's case*[2], was applicable to the case before them, their attention was not drawn to the material change made by the amendment of section 10 of the Indian Act. But the view expressed by the Court in that case on the point of law is clearly *obiter*. The actual decision was that no sufficient cause had been shown by the claimant even on the liberal construction of the proviso, and so the order directing the employer to pay compensation to his workmen was set aside. Thus it would be clear that the decisions on which Mr. Phadke founds his argument were concerned with a statutory provision as to limitation which is essentially different from the provision made by the proviso with which we are concerned.

The proviso with which we are concerned has prescribed the limitation of six months for the institution of the application itself, and so the principle laid down in *Lingley's case*[2], can have no application to the question which we have to decide. Indeed, the present proviso is in substance similar to the provision in section 5 of the Limitation Act, and Mr. Phadke has fairly conceded that there is consensus of judicial opinion on the question of the construction of section 5. It cannot be disputed that in dealing with the question of condoning delay under section 5 of the Limitation Act the party has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time, and this has always been understood to mean that the explanation has to cover the whole of the period of delay. (Vide *Ram Narain Joshi* v. *Parmeswar Narain Mahta and others*)[3]. Therefore the finding recorded by the authority that the appellants have failed to establish sufficient cause for their inaction between May 2, 1952, and the respective dates on which they filed their present applications is fatal to their claim. That is why we think it unnecessary to consider the larger question of law which Mr. Phadke sought to raise before us.

We would like to add that the learned Attorney-General had raised a preliminary objection against the validity of the certificate granted by the High Court in the present appeals. He wanted to urge that the High Court was in error in considering the total value of the consolidated appeals for the purpose of granting certificate under Article 133. We have, however, not thought it necessary to consider this argument.

The result is the appeals fail and are dismissed. The respondent has fairly not pressed for his costs, and so we direct that the parties should bear their own costs in this Court. No order as to Court-fees.

Appeals dismissed.

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1. (1952) 1 L.L.J. 490 at 492.
2. L.R. (1921) 1 K.B. 655.
3. (1903) I.L.R. 30 Cal. 309.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

The State of Jammu and Kashmir and others .. *Appellants**

v.

Thakur Ganga Singh for self and on behalf of other shareholders of M/s. Jammu and Kashmir Mechanics and Transport Workers Co-operative Society, Limited and another .. *Respondents.*

Constitution of India (1950), *Article* 132—*Law as to interpretation of Article* 14 *well-settled—Application to facts of the case—Does not raise " substantial question of law "—Special Leave when granted.*

Where the only question round which the dispute centred was whether an impugned rule stood the test of reasonable classification Special Leave under Article 132 (2) of the Constitution cannot be granted. Under Article 132 (2) there is no scope for granting Special Leave unless two conditions are satisfied: (1) the case should involve a question of law as to the interpretation of the Constitution; and (ii) the said question should be a substantial question of law. The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. Where the parties agree on the true interpretation of an Article (for instance Article 14) or do not raise any question in respect thereof, it is not possible to hold that the case involves any qsuestion of law as to the interpretation of the Constitution. A series of decisions of the Supreme Court has evolved the doctrine of classification on an interpretation of Article 14. The interpretation of Article 14 in the context of classification has been finally settled by the highest Court of this land and under Article 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where the law has been finally and authoritatively settled by the Supreme Court.

Appeal by Special Leave from the Judgment and Order, dated the 20th June, 1958, of the Jammu and Kashmir High Court in Writ Petition No. 108 of 1958.

H. N. Sanyal, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them), for Appellants.

R. K. Garg and *M. K. Ramamurthy*, Advocates and *S. N. Andley*, *J. B. Dadachanji*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave raises the question of the scope of Article 132 (2) of the Constitution.

The first respondent is one of the shareholders of the second respondent, M/s. Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Ltd., Jammu (hereinafter called the Society). The Society was registered under the Jammu and Kashmir Co-operative Societies Act No. VI of 1993 (Vikrimi). They put in a number of applications before the third appellant for the grant of stage carriage and public carrier permits to them for various routes in the State of Jammu and Kashmir, but no permits were granted to them on the ground that under rule 4-47 of the Jammu and Kashmir Motor Vehicles Rules (hereinafter called the Rules) service licence could only be issued to a person or a company registered under the Partnership Act and that, as the Society was neither a person nor a partnership, it was not entitled to a licence under the Rules. The respondents filed a petition in the High Court of Jammu and Kashmir under section 103 of the Constitution of Jammu and Kashmir challenging the vires of rule 4-47 of the Rules. To that petition the appellants herein, *viz.*, the Government of Jammu and Kashmir State, the Transport Minister, the Registering Authority and the Traffic Superintendent, were made party-respondents. The High Court held that the said rule was *ultra vires* as offending Article 14 of the Constitution, and, on that finding, directed a writ of *mandamus* to issue against the appellants herein from enforcing the provisions

*Civil Appeal No. 217 of 1959. 26th November, 1959.

of the said rule. The appellants filed an application in the High Court for a certificate under Article 132 (1) of the Constitution, but the High Court rejected it on the ground that no substantial question of law as to the interpretation of the Constitution was involved in the case. Thereafter the appellants applied for Special Leave under Article 132 (2) of the Constitution and this Court granted the same. The order giving the Special Leave expressly granted liberty to the respondents herein to raise the question of the maintainability of the appeal at its final hearing.

Learned counsel for the respondents raises a preliminary objection to the maintainability of the appeal. Shortly stated his objection is that under Article 132 (2) of the Constitution Special Leave can be given only if the Supreme Court is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, that in the present case the interpretation of Article 14 of the Constitution has been well-settled and put beyond dispute by a series of decisions of this Court, that, therefore, no question of law as to the interpretation of the Constitution, much less a substantial question of law in regard to that matter, arises for consideration and that, therefore no Special Leave can be granted under the said Article.

This argument is sought to be met by the learned Additional Solicitor-General in the following manner: Whenever a question of classification is raised, it involves the interpretation of Article 14 of the Constitution with reference to the classification impugned. To state it differently, the argument is that the question in each case is whether the classification offends the principle of equality enshrined in Article 14. Therefore, whether a registered firm, a limited company and a person have equal attributes is a question of interpretation of Article 14 of the Constitution.

Before considering the validity of the rival contentions it would be convenient to ascertain precisely what was the question raised in the High Court and what was the decision given thereon by it. The argument advanced before the High Court on behalf of the Society was that under rule 4-47 a licence can be issued only to a person or a firm registered under the Partnership Act and not to a corporation registered under the Co-operative Societies Act or otherwise, and, therefore, the said rule, being discriminatory in nature, offends Article 14 of the Constitution. The learned Advocate-General appearing for the appellants contended that under Article 14 of the Constitution rational classification is permissible and the Legislature has framed the impugned rule on such a basis, the object of which is to safeguard the interest of the public. The High Court, after considering the rival arguments, expressed the opinion that the said rule did not proceed on any rational basis of classification and that, as a corporation had been arbitrarily singled out for discriminatory treatment, the impugned rule offended the equality clause of the Constitution. The appellants in their petition for Special Leave filed in this Court questioned the correctness of the conclusion of the High Court. They asserted that the said rule was based upon reasonable classification and therefore could not be struck down as repugnant to Article 14 of the Constitution. In other grounds they elaborated the same point in an attempt to bring out the different attributes of the two classes affording an intelligible differentia for classification. They clearly posed the question proposed to be raised by them in the appeal as under :

Ground (iv): "The aforesaid rule 4-47 (of the Motor Vehicles Rules) is based upon reasonable classification and is and was perfectly *intra vires* and valid and could not be struck down as repugnant to Article 14 of the Constitution of India."

Ground (vi): "There is a marked difference between a corporate body and partnership registered under the provisions of the Partnership Act and these points of difference provide an intelligible differentia for classification. The Hon'ble High Court has only referred to one point of difference and has overlooked other points of distinction and has erred in striking down the aforesaid rule 4-47."

Ground (viii): "Rule 4-47 was framed in the light of local conditions prevaling. Co-opetative Societies and Corporations in the matter of transport were not considered to be proper objects for the grant of licence or permit. The classification is rational and reasonable. The exclusion of artificial persons from the ambit of the Rule is natural and not discriminatory."

The other grounds are only a further clarification of the said grounds. In Part II of their statement of case the appellants stated as follows :

"It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation."

The respondents, in their statement of case, accepted the said legal position but contested the position that there was reasonable classification. It is therefore manifest that throughout there has never been a controversy between the parties in regard to the interpretation of Article 14 of the Constitution, but their dispute centered only on the question whether the impugned rule stood the test of reasonable classification.

In the premises, can Special Leave be granted to the appellants under Article 132 (2) of the Constitution ? Article 132 (2) reads :

"Where the High Court has refused to give such a certificate the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant Special Leave to appeal from such judgment, decree or final order."

Under clause (2) of Article 132 there is no scope for granting a Special Leave unless two conditions are satisfied : (i) the case should involve a question of law as to the interpretation of the Constitution ; and (ii) the said question should be a substantial question of law. The principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court. With that object the Article is freed from other limitations imposed under Articles 133 and 134 and the right of appeal of the widest amplitude is allowed irrespective of the nature of the proceedings in a case involving only a substantial question of law as to the interpretation of the Constitution.

What does interpretation of a provision mean ? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible constructions are sought to be placed on a provision—one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Article 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of Article 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor-General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether an artificial person and a natural person have equal attributes within the meaning of the equality clause, and therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different garb. If analysed, the argument only comes to this : as an artificial person and a natural person have different attributes, the classification made between them is valid. This argument does not suggest a new interpretation of Article 14 of the Constitution, but only attempts to bring the rule within the doctrine of classification. We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution.

Assuming that the case raises a question of law as to the interpretation of the Constitution, can it be said that the question raised is a substantial question of law within the meaning of clause (2) of Article 132. This aspect was considered by the Federal Court in *T. M. Krishnaswami Pillai* v. *Governor-General in Council*[1]. That

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1. (1947-48) 52 C.W.N. (F.R.) 1 : (1947) 2 M.L.J. 400 : 1947 F.L.J. 70 (F.C.).

decision turned upon the provisions of section 205 of the Government of India Act, 1935. The material part of that section says :

Section 205 : "(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Coucil made thereunder. . . . ."

The Madras High Court gave a certificate to the effect that the case involved a substantial question of law as to the interpretation of section 240 (3) of the Government of India Act, 1935. Under section 240 (3) of the said Act, no person who was a member of a Civil Service of the Crown in India or held any civil post under the Crown in India could be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The High Court, on the facts found, held that the appellant therein had been offered a reasonable opportunity of showing cause within the the meaning of the said section, but gave a certificate under section 205 (1) of the Government of India Act, 1935. In dealing with the propriety of issuing the certificate in the circumstances of that case, Zafrulla Khan, J., speaking on behalf of the Court, concisely and pointedly stated at page 2:

"It was urged before us that the case involved a question relating to the interpretation of sub-section (3) of section 240 of the Act. To the extent to which any guidance might have been needed for the purposes of this case on the interpretation of that sub-section that guidance was furnished so for as this Court is concerned in its judgment in *Secretary of State for India* v. *I.M. Lal*[1]. The rest was a simple question of fact. In our judgment no "substantial question of law" as to the interpretation of the Constitution Act was involved in this case, which could have formed the basis of a certificate under section 205 (1) of the Act."

On the question of interpretation of Article 14 of the Constitution this Court in *Budhan Choudhry* v. *The State of Bihar*[2] explained the true meaning and scope of that Article thus :

" It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases : namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be nexus between the basis of classification and the object of the Act under consideration."

This is only a restatement of the law that has been enunciated by this Court in *Chiranjit Lal Chowdhuri* v. *The Union of India*[3], and in other subsequent decisions. The said principles were re-affimed in the recent decisions of this Court in *Ram Krishna Dalmia* v. *Justice Tendolkar*[4], and in *Mohammed Haneef Qureshi* v. *State of Bihar*[5]. In view of the said decision there is no further scope for putting a new interpretation on the provisions of Article 14 of the Constitution *vis-a-vis* the doctrine of classification. The interpretation of Article 14 in the context of classification has been finally settled by the highest Court of this land and under Article 141 of the Constitution that interpretation is binding on all the Courts within the territory of India. What remained to be done by the High Court was only to apply that interpretation to the facts before it. A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by this Court.

In the result we accept the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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1. (1945) F.C.R. 103 : (1945) 2 M.L.J. 270 : 1945 F.L.J. 129.
2. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045 1049.
3. (1951) S.C.J. 29 : (1950) S.C.R. 869.
4. (1959) S.C.J. 147 : (1959) 1 M.L.J. (S.C.) 67 : (1959) 1 An.W.R. (S.C.) 67 : (1959) S.C. 279.
5. (1958) S.C.J. 975 : 1958 M.L.J. (Cr.) 727 : (1959) S.C.R. 629.

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

M/s. Fedco (P.) Ltd., and another .. *Petitioners**

v.

S. N. Bilgrami and others .. *Respondents.*

Imports Control Order (1955), *clause* 9 (*a*)—*Power to cancel licence granted through fraud or misrepresentation—If violative of licensee's rights under Article* 19 (1) (*f*) *and* (*g*) *and Article* 31 *of the Constitution of India*, (1950).

The entire scheme of control and regulation of imports by licenses is on the basis that the license is granted on a correct statement of relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licencee himself or some other party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licence has disappeared. It will be absolutely unreasonable that such a licence should be allowed to continue. The provision in clause 9 (*a*) of the Imports Control Order, 1955, that a licence may be cancelled, if it is found, after giving a reasonable opportunity to the licensee to be heard, to have been obtained by fraud or misrepresentation is a reasonable restriction in the interests of the general public on the exercise of a fundamental right of a citizen guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution. The cancellation under clause 9 (*a*) of the Imports Control Order being under a valid law there can be no question of any right under Article 31 of the Constitution having been infringed.

The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given ; the second is that the opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable.

Where the petitioners were concerned to show that they were not parties to the fraud than to show that there was no fraud practised at all, the omission to give particulars of the fraud or inspection of papers did not deprive the petitioners of a fair chance of convincing the authority that the grounds on which cancellation of licenses was proposed did not exist, or even if they existed, they did not justify cancellation of the licences. Therefore the opportunity that was given was a reasonable opportunity in the instant case.

Per *Subba Rao, J.*—Unless particulars of the fraud were given and documents shown to them it was not possible for the petitioners to know whether a fraud was committed at all and if committed, how it was committed. When they were denied these it is not possible to hold that they had a reasonable opportlnity of being heard in the circumstances.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

Purshottam Tricumdas, Senior Advocate (*Porus A. Mehta*, Advocate and *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates of *Messrs. Rajinder Narain & Co.*, with him), for Petitioners.

C. K. Daphtary, Solicitor-General of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them (for Respondents,).

The Court delivered the following Judgments :—

Das Gupta, J. (For the Majority).—The first petitioner is a Company registered under the Indian Companies Act, having its registered office in Bombay and is engaged in the business of dyes, chemicals, plastics, and various other goods. The second petitioner is the Chairman and a Director of the first petitioner Company. In this petition for enforcement of fundamental rights under the Constitution they pray for the issue of a writ of *certiorari* or other appropriate writ, direction or order quashing an order made by the first respondent, the Chief Controller of Imports and Exports, Government of India, New Delhi, by which he cancelled five import licences which had been granted to the first petitioner by the Joint Chief Controller of Imports and Exports, Bombay. There is also a prayer for an order on the second respondent, the Collector of Customs, Bombay, directing him to assess the goods of the petitioner

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*Petition No. 171 of 1958. 9th December, 1959.

Company which have been landed in Bombay having been imported on the strength of these licences and allow the petitioner company to clear them. Of these five licences, two were dated July 24, 1958, two dated August 16, 1958, and the fifth dated September 4, 1958. The total value of the imports authorised by these five licences was Rs. 25,75,000. The petitioners contended that these five licences were granted to the petitioner Company on five applications sent by them by registered post to the Chief Controller of Imports and Exports, Government of India, New Delhi—three sent on June 17, 1958; one on June 26, 1958; and the last on July 22, 1958. It is further stated that in respect of each of these applications a letter was received by the Company from the office of the Chief Controller of Imports and Exports, Government of India, New Delhi, intimating that their application had been forwarded to the Joint Chief Controller of Imports and Exports, Bombay, with the necessary comments and asking the Company to contact this officer, the Joint Chief Controller of Imports and Exports, Bombay, direct in the matter. The petitioner Company wrote in each case to the Chief Controller of Imports and Exports, New Delhi, acknowledging receipt of these letters and at the same time to the Joint Chief Controller of Imports and Exports, Bombay, requesting that the licences should be issued to them at an early date. After the licences were received by the Company from the office of the Joint Chief Controller of Imports and Exports, Bombay, the Company placed orders for the goods covered by these licences and some of the goods actually arrived at Bombay. Before however any of these goods could be cleared the Company received a notice dated September 24, 1958, stating that whereas there was reason to believe that these five licences had been obtained fraudulently, the Government in the exercise of the powers specified in para. 9 of the Imports Control Order, 1955, proposed to cancel the said licences unless sufficient cause against that was furnished to the Chief Controller of Imports and Exports, New Delhi within 10 days of the date of the issue of the said notice. On September 26, the petitioner Company's solicitors sent a telegram to the Chief Controller of Imports and Exports, New Delhi, requesting him to give particulars of the alleged fraud and to give them an appointment for inspection of papers and documents relied upon by him. On September 27, the Company wrote a letter to the same officer in which they gave a written explanation pointing out various facts and stating that they were victims of foul play by some person interested in causing damage to them and involving their reputation and in order to bring them in bad books with the authorities. In the concluding portion of this letter the Company stated :

> "We also reserve our right to add to, amend or alter the explanations contained in this letter hereafter and to submit such further explanations as may become necessary after taking inspection of all the papers and after getting the particulars of the alleged fraud. We shall thank you to give us also an opportunity of a personal hearing in the matter."

This written explanation was handed over to the first respondent by the Company's representatives at an interview with him on September 30. At that interview also, it is said, the representatives of the Company pointed out to Mr. Bilgrami that in the absence of any particulars of the alleged fraud and without inspection of the papers relied upon by him it was not possible for the petitioners to give a complete explanation and that they reserved their right to give further explanation on getting the said particulars and inspection of the said papers. The Company's representatives had another interview with Mr. Sundaram, Director (Administration), in the Chief Controller's Office on October 14, 1958. At this interview the petitioners again requested Mr. Sundaram to give them particulars and that they might be permitted to inspect the papers. No particulars were however furnished and no inspection was allowed ; but on that very date when they had this interview with Mr. Sundaram the first respondent made the order of cancellation.

The ten grounds set out in clauses A to L of para. 15 of the petition as the basis for the relief resolve on analysis into four only. These are :—

(1) Clause 9 (*a*) of the Import Control Order under which the order of cancellation has been made is itself unconstitutional being violative of the petitioners' rights under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution ;

(2) The order of cancellation has been made without compliance with the mandatory requirement of clause 10 of the Imports Control Order to give the licensee " a reasonable opportunity of being heard ".

(3) The first respondent, Mr. Bilgrami, had no authority in law to make any order under clause 9 of the Import Control Order ;

(4) The petitioners have been denied equal protection of laws under Article 14 of the Constitution inasmuch as other persons similarly situated have been given a proper opportunity and a personal hearing before taking any action against them, while the petitioners have been denied a proper opportunity to show cause for the cancellation of licences and personal hearing in the matter.

Of these four grounds, the third ground, *viz.*, that Mr. Bilgrami had no authority in law to make an order under clause 9 of the Imports Control Order was made in apparent ignorance of the fact that the Chief Controller of Imports and Exports, became competent to make an order thereunder in consequence of an amendment made in the Order, in 1958. As the clause originally stood the relevant words were : " The Central Government or any other officer authorised in this behalf may cancel any licence granted under this order....". By the amendment made on February 27, 1958, the words " or the Chief Controller of Imports and Exports " were inserted after the words " the Central Government " in this clause. The position on the relevant dates in September and October, 1958, therefore was that the Chief Controller of Imports and Exports, New Delhi, had authority to cancel any licence granted under the Imports Control Order without being specially authorised in that behalf. It was apparently in view of this position which was pointed out by Mr. Bilgrami in his affidavit in opposition that the learned counsel for the petitioners did not press this ground at all. Nor did he press the fourth ground, *viz.*, that the petitioner's right under Article 14 of the Constitution has been infringed. It is obvious that if the order has been made without the petitioners having been given a reasonable opportunity of being heard that itself would entitle them to the relief prayed for. The question whether or not other persons were given a fair opportunity of being heard is entirely irrelevant.

In opposition to this application, Mr. Bilgrami, the first respondent, contends *inter alia* that the provision or cancellation of a licence under clause 9 of the Order does not contravene any of the fundamental rights granted under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution and that the petitioners were given adequate and reasonable opportunity of being heard before the order of cancellation was made. Mr. Bilgrami has stated in the affidavit that while it is true that four applications for licence—three dated June 17, and one dated June 26, 1958, were received in his office, the fact is that all these four applications were rejected, and that it is now found that while these four rejected applications were lying in his office, four similar applications bearing the same dates and containing the same particulars and a fifth application bearing the date July 22, 1958, somehow made their appearance in the office of the Joint Chief Controller of Imports and Exports, Bombay, along with five separate letters, one in respect of each application, containing recommendations for issue of licences purporting to have been issued from the Office of the Chief Controller of Imports and Exports, New Delhi, under the signature of one Shri M. L. Gupta, Deputy Chief Controller of Imports and Exports. The respondent contends that the purported signatures of Shri M. L. Gupta on these letters were not genuine. Mr. Bilgrami also contends that though these letters purported to state that the issue of licences was authorised by him he did not in fact give any authority, and that when the petitioners' representatives interviewed him on September 30, 1958, they were told of the " general nature of the fraud " and that he further told them that the issue of the licences had not been authorised by him as they purpoted to be and that they had been obtained fraudulently. The respondents further contend that when again on October 14, 1958, the petitioners had an interview with Mr. Sundaram, the Director of Administration in the Office of the Chief Controller of Imports and Exports Mr. Sundaram told them expressly

that the recommendations against which the disputed licences were granted to the petitioners were not genuine.

The first contention on behalf of the petitioners is that clause 9 (*a*) of the Import Control Order is itself invalid as it violates a licencee's rights under Article 19 (1) (*f*) and (*g*) and Article 31 of the Constitution. Clause 9 (*a*) is in these words :—

" *Cancellation of Licences.*—The Central Government or the Chief Controller of Imports and Exports or any other officer authorised in this behalf may cancel any licence granted under this order or otherwise render it ineffective :—

(*a*) If the licence has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation. . . . .".

As in the present case there is no question of the licences having been granted through inadvertence or mistake it is not necessary for us to consider whether the provision for cancellation of licences on the ground that they have been granted through mistake or inadvertence is invalid. The question in the present case is whether the provisions for cancellation of licences on the ground that they have been obtained by fraud or misrepresentation is " a reasonable restriction in the interests of the general public " on the exercise of the petitioners' right under Article 19 (1) (*f*) and (*g*). It has to be noticed first that here is no case of unbridled authority to cancel a licence nor is there any scope for arbitrary action. If a provision for giving a reasonable opportunity of being heard had not been made in the Order itself, it would have been necessary to consider whether this had still to be given because rules of natural justice required it. No discussion about the requirements of the rule of natural justice is however called for here, as clause 10 of the Order provides that no action shall be taken under clauses 7, 8 or 9, unless the Licensee/Importer has been given *a reasonable opportunity of being heard.* It is proper to state that the learned counsel for the petitioners does not attack the validity of the provisions on the ground that it gives unbridled authority to cancel a licence, or that the requirements of natural justice have not been sufficiently fulfilled by clause 10. His argument is that though it may not be unreasonable that a licence should be cancelled if the licensee himself has practised fraud in obtaining it, cancellation is wholly unreasonable if it is made merely on the ground that it has been obtained by fraud, without it being further shown that the licensee himself has been a party to the fraud. It appears to us that in most cases, if not in all cases, where a licence is obtained by fraud or misrepresentation it would be reasonable to think that the person in whose favour the licence has been obtained, cannot but be a party to the fraud or misrepresentation. The petitioners' counsel submitted that it is possible to imagine a case where an enemy of the person in whose favour the licence is granted procures such grant by means of fraud with the deliberate motive of accusing this person later on of fraud and thereby subjecting him on the one hand to criminal prosecution and on the other hand damaging his reputation and ruining his business. It is unnecessary for us to decide in the present case whether this may ever happen. Clearly however the fact that fraud by which the grant of the licences has been induced by an enemy is wholly immaterial on the present question. The entire scheme of control and regulation of imports by licences is on the basis that the licence is granted on a correct statement of relevant facts. That basis disappears if grant of the licence is induced by fraud or misrepresentation. Whether the licensee himself or some other party is responsible for the fraud or misrepresentation, the fact remains that in such cases the basis of the grant of licence has disappeared. It will be absolutely unreasonable that such a licence should be allowed to continue. We are therefore of opinion that the provision that licence may be cancelled, if it is found, after giving a reasonable opportunity to the licensee to be heard, to have been obtained by fraud or misrepresentation is a reasonable restriction in the interests of the general public on the exercise of the fundamental right of a citizen guaranteed under Article 19 (1) (*f*) and (*g*) of the Constitution. The cancellation being under a valid law there can be no question of any right under Article 31 of the Constitution having been infringed.

This brings us to the main contention pressed on behalf of the petitioners, *viz.*' that the licensee has not been given a reasonable opportunity of being heard before

the order of cancellation was made. There can be no doubt that if a reasonable opportunity to be heard as against the proposed order of cancellation has not been given the order would be an unjustified interference with the petitioners' right. It is necessary therefore to examine the material on the record to see whether the petitioners have succeeded in showing that no reasonable opportunity has been given.

The requirement that a reasonable opportunity of being heard must be given has two elements. The first is that an opportunity to be heard must be given; the second is that this opportunity must be reasonable. Both these matters are justiciable and it is for the Court to decide whether an opportunity has been given and whether that opportunity has been reasonable. In the present case, a notice to show cause against the proposed order was given; it was stated in the notice that the ground on which the cancellation was proposed was that the licences had been obtained fraudulently; and later on, a personal hearing was given. It must therefore be held that the requirement that an opportunity to be heard must be given was satisfied. What the petitioners' counsel strenuously contends however is that though an opportunity was given that opportunity was not reasonable. In making this argument he had laid special stress on the fact that particulars of the fraud alleged were not given and an opportunity to inspect the papers though repeatedly asked for was not given. It is now necessary to consider all the circumstances in order to arrive at a conclusion whether the omission to give particulars of fraud and inspection of papers deprived the petitioners of a reasonable opportunity to be heard.

There can be no invariable standard for "reasonableness" in such matters except that the Courts conscience must be satisfied, that the person against whom an action is proposed has had a fair chance of convincing the authority who proposes to take action against him that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the attitude of the party against whom the action is proposed in showing cause against such proposed action, the nature of the plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and all other matters which help the mind in coming to a fair conclusion on the question. The action proposed in the present case, *viz.*, the cancellation of the five licences was proposed on a tentative conclusion by Mr. Bilgrami on the basis of the material in his possession that the five licences had been obtained fraudulently. The main grounds on which this tentative conclusion appears to have been based were that four applications—three dated June 17 and one dated June 26, 1958, similar in all particulars to the four which are now found in the office of the Joint Controller of Imports and Exports, Bombay, had been actually received but had been rejected and were lying in the Chief Controller's Office; that four similar applications, bearing the same dates and same particulars which were lying in the Bombay Office and also a fifth application dated July 22, were accompanied by five forwarding letters purporting to have been signed by Mr. M. L. Gupta recommending the prayer for licence and containing a statement that the first respondent had authorised such issue of licences on those applications but these signatures purporting to have been of Mr. M. L. Gupta were not really his signatures; that while the forwarding letters purported to state that the issue of these licences prayed for had been authorised by Mr. Bilgrami as the Chief Controller of Imports and Exports, New Delhi, he himself knew that such issue had not been authorised by him. We find that in the very notice that was given to the petitioners' company to show cause against the proposed action of cancellation, it was stated that these licences appeared to have been obtained by fraud. On the question of particulars of fraud, it has been stated by the first respondent in his affidavit that at that stage no particulars of the fraud could be given by him as they were unknown to him, but that he did inform the petitioners' representives—Mr. Parikh, a Director of the Company, the second petitioner, Mr. Rangwala, who is the Chairman of the Company and the Company's

solicitor, Mr. Hussaini Doctor of the "general nature of the fraud". In para. 23 of his affidavit Mr. Bilgrami has made the following statement :—

"I say that the Director of the pettioners' Company, Shri B. K. Parekh and Shri Rangwala and their attorney's partners, Mr. Huseini Doctor saw me on the 30th September, 1958. I told them that the issue of the licences had not been authorised by me as they purported to be and that they had been obtained fraudulently, though at that stage I was unable to say how exactly and by whom the fraud was committed. As also the investigation by the Police was already in progress, it was not possible to give minute particulars of the fraud. When the petitioners were told as above, the petitioners' chairman started raising contentions suggesting that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feelings amongst the employees of his firm."

The affidavit in reply was sworn by Rangwala himself. We find therein repeated denials of Mr. Bilgrami's assertion that the Company's representatives were told of the "general nature of the fraud". It is worth noting, however, that as regards the categorical statement made in para. 23 as to what Mr. Bilgrami told Mr. Rangwala and others and what they told him there is no clear denial. Dealing with para. 23 of Bilgrami's affidavit in para. 20 of his own affidavit in reply. Rangwala after saying that the first respondent's statement does not say anything as to how exactly and by whom the fraud was committed but simply added that the first respondent did not say anything beyond the fact that the licences had been obtained by fraud. It is significant that no specific denial was made of Mr. Bilgrami's assertion that to Mr. Rangwala, Mr. Parekh and Mr. Huseini Doctor he had himself stated that the "issue of the licences had not been authorised by him as they purported to be". No less important is the fact that Rangwala does not deny the assertion made by Mr. Bilgrami that he (Mr. Rangwala) in the course of that interview on September 30, suggested that the fraud might have been committed by reason of certain feelings amonst the employees of his firm. It is reasonable therefore to believe that besides stating that the licences had been obtained fraudulently, Bilgrami definitely informed the Company's representatives on September 30, 1958, that though issue of the licences had been purported to be authorised by him—with apparent reference to the forwarding letters recommending the issue of the licences—this had not actually been authorised and further that on receipt of this information the Company's representatives instead of saying that no fraud had been practised and that Mr. Bilgrami was making a mistake in thinking that he had not authorised the issue of the licences and that perhaps his memory had failed him took refuge behind the plea that it was not the Company but some enemy of the Company who had perpetrated the fraud.

The petitioners' representatives had also an interview with Mr. Sundaram on October 14, 1958. While we have not got any statement of Mr. Sundaram himself as to what happened in that interview we find apart from Mr. Bilgrami's affidavit in para. 24 that Mr. Sundaram also informed the petitioners' representatives at that interview that the recommendations against which the disputed licences were granted to the petitioners were not genuine, (which assertion was repeated in slightly different words in para. 29) the fact that the first respondent's letter, dated December 18, 1958, a copy of which Mr. Rangwala annexed to his affidavit in reply concluded with the following words :—

"It may be stated that the fact that the following letters referred to above were not genuine were mentioned to the representatives of your firm when they interviewed Shri D. R. Sundaram, Director, (Administration) on 14th October, 1958."

Though annexing a copy of this letter to his affidavit in reply Mr. Rangwala did not state that this statement in the concluding portion of the letter was not true. This justifies the conclusion that Mr. Bilgrami's assertion that Mr. Sundaram told the Company's representatives that the forwarding letters containing the recommendations on the basis of which the licences had been issued were not genuine is true. Mr. Bilgrami's statement in para. 29 of his affidavit is that when Mr. Sundaram informed the Company's representatives of this they had no explanation to give. Dealing with para. 29 of this affidavit in para. 23 of his own affidavit Mr. Rangwala

did not state that Mr. Sundaram did not tell them that the licences issued were on the basis of documents which were not genuine, or that on being so told they had no explanation to offer.

On a consideration of the entire background in which the notice for cancellation was issued, what was stated by the petitioners in their letter, dated September 27, and what we find to have taken place at the interviews on the 30th September and the 14th October, specially the fact that the Company's representatives appeared to have been more concerned to show that the Company was not a party to the fraud than to show that there was no fraud practised at all, we are of opinion that the omission to give further particulars or inspection of papers did not derprive the petitioners of a fair chance of convincing Mr. Bilgrami that the grounds on which cancellation of the licences was proposed did not exist, or even if they existed, they did not justlfy cancellation of the licences. We are, therefore, of opinion that the opportunity that was given to the petitioners in the present case amounted to a reasonable opportunity of being heard against the action proposed.

The petitioners are, therefore, not entitled to any relief.

The petition is accordingly dismissed with costs.

Subba Rao, J.—I have had the advantage of perusing the judgment of my learned brother, Das Gupta, J., I regret my inability to agree with his conclusion.

The facts are fully stated in the judgment of my learned brother and I shall, there fore, briefly restate only the material facts. The first petitioner, M/s. Fedco (Private) Limited (hereinafter called the Company) is a Company registered under the Indian Companies Act having its registered office in Bombay. It is engaged in the business of dyes, chemicals, plastics and various other goods. The second petitioner is the Chairman and a Director of the first petitioner-Company. The Company sent five applications by registered post to the Chief Controller of Imports and Exports, New Delhi, (hereinafter called the Chief Controller). Three of the applications were dated June 17, 1958, one was dated June 26, 1958, and the last was dated July 22, 1958. In the said applications the Company prayed for the issue of import licences to enable them to place orders and import different types of goods from West Germany. In regard to each of these applications, the Company received a letter purporting to be from the office of the Chief Controller intimating them that their applications had been forwarded to the Joint Chief Controller of Imports and Exports, Bombay, (hereinafter called the Joint Controller) with the necessary comments. The Company acknowledged the receipt of these letters. Thereafter five licences were received from the Office of the Joint Controller,Bombay, and two of them were dated July 24, 1958, another two were dated August 16, 1958, and the fifth was dated September 4, 1958. On the basis of the said licences, orders were placed with a foreign company in West Germany and goods of considerable value actually arrived in the Bombay port. By letter dated September 23, 1958, the Joint Controller asked the Company to return the said five licences granted to them without entering into any commitments. After some correspondence between the Company and the Chief Controller, the former received a notice, dated September 24, 1958, from the latter to the effect that the Government had reason to believe that the said licences were obtained fraudulently and therefore they proposed to cancel the said licences unless sufficient cause was shown against such action being taken within ten days of the issue of the said notice. On October 16, 1958, the Company received an undated order from the Chief Controller purporting to cancel the said five licences. The Company and their manager filed the present petition under Article 32 of the Constitution praying for a writ of *certiorari* or other appropriate writ quashing the order of the Chief Controller cancelling the said five licences and directing the Collector of Customs, Bombay, to assess the goods of the Company which had been imported into India and allow them to clear the same.

Mr. Purshottam Trikamdas, learned counsel for the petitioners, in support of his contentions raised before us two points, *viz.*, (1) clauses 9 and 10 of the Imports

Control Order, 1955, (hereinafter called the Order) whereunder the licences were cancelled infringe the fundamental rights of a citizen under Article 19 (1) (*f*) and (*g*) of the Constitution inasmuch as the said provisions constitute an arbitrary and unreasonable restriction on the said rights; and (2) the Chief Controller has not complied with the provisions of clause 10 of the Order as he failed to give the Company reasonable opportunity of being heard before the licences granted to them were cancelled and therefore the act of the Chief Controller in cancelling the licences infringes the rights of the Company under Article 19 (1) (*f*) and (*g*) of the Constitution.

The first point need not be considered as I am clearly of the view that no "reasonable opportunity" within the meaning of clause 10 of the Order was given to the petitioners by the Chief Controller. The material parts of clauses 9 and 10 of the Order read :—

"Clause 9. *Cancellation of Licences.*—The Central Government or any other Officer authorised in this behalf may cancel any licence granted under this Order or otherwise render it ineffective :—

(*a*) if the licence has been granted through inadvertence or mistake or has been obtained by fraud or misrepresentation ;".

Clause 10. *Applicant or Licensee to be heard.*—No action shall be taken under clauses 7, 8 or 9 unless the licencee Importer has been given a reasonable opportunity of being heard."

It is not disputed that the Central Government delegated its powers to act under these clauses to the Chief Controller. The first question is, what is the scope of the enquiry under clause 10 of the Order? Is it purely an administrative act or is it a quasi-judicial act? The criteria to ascertain whether a particular act is a quasi-judicial act or an administrative one have been laid down with clarity by Lord Justice Atkin in *Rex* v. *Electricity Commissioners, Ex Parte London Electricity Joint Committee Co.*[1], elaborated by Lord Justice Scrutton in *Rex* v. *London County Council, Ex Parte Entertainments Protection Association, Ltd.*[2] and authoritatively restated by this Court in *Province of Bombay* v. *Khusaldas S. Advani*[3]. They laid down the following conditions : (*a*) the body of persons must have legal authority ; (*b*) the authority should be given to determine questions affecting the rights of subjects ; and (*c*) they should have a duty to act judicially. All the three conditions are satisfied in this case. Under the said clauses authority is conferred on the Central Government or any other officer authorized in this behalf to cancel any licence granted under the Order and the cancellation of a licence certainly affects the rights of subjects. A clear duty to act judicially is imposed by clause 10 on the said authority. He has to give to the affected party "reasonable opportunity of being heard". It is, therefore, clear that under clauses 9 and 10 of the Order, the Chief Controller performs a quasi-judicial act and is therefore bound to follow the principles of natural justice in cancelling a licence. Clause 10 clearly and without any ambiguity describes the principles of natural Justice by using the three well-known words and phrase, *viz.*, "reasonable", "opportunity" and "of being heard". They imply that when the charge is one of fraud the affected party is entitled to know the particulars of fraud alleged, to inspect the documents on the basis of which fraud is imputed to him and to a personal hearing to explain his case and to absolve himself of the charge made against him. Without these elementary safeguards provided by the authority, the opportunity to be heard given to the licensee becomes an empty formality. With this background I shall scrutinize the relevant facts to ascertain whether any such reasonable opportunity was given to the petitioners in this case. The question falls to be decided only on the affidavits filed by the parties. I shall assume for the purpose of this petition that the affidavit filed by the Chief Controller represents what all had taken place between him and the representatives of the Company. The notice dated September 24, 1958, issued to the petitioners laconically states that the licences granted by the Joint Controller to the Company were fraudulently obtained and therefore it was notified that the Government of India, in exercise of the powers specified in paragraph

1. L.R. (1924) 1 K.B. 171.
2. L.R. (1931) 2 K.B. 215.
3. (1950) S.C.J. 451 : (1950) 2 M.L.J. 703 : (1950) S.C.R. 621.

9 of the Order proposed to cancel the said licences unless sufficient cause against the proposed action was furnished to the Chief Controller within ten days of the date of the issue of the notice. On receipt of the said notice, the petitioner Company sent a telegram through their Solicitors requesting the Chief Controller not to publish the said notification. On September 26, 1958, the Company's Solicitors sent another telegram to the Chief Controller requesting him to give them the particulars of the alleged fraud and to give them an appointment for inspection of papers and documents relied upon by the Chief Controller. On September 27, 1958, the Company sent a letter to the Chief Controller pointing out the relevant facts and stating that the petitioner-Company had accepted the licences honestly and had at no time any reason to doubt the *bona fides* of the grant of the licences to them ; that they suspected that they were victims of foulplay by some persons interested in causing damage to them and to their reputation ; that Mr. B. K. Parekh, a Director of the petitioner-Company, and the Company's Solicitor, Mr. Hooseini Doctor, met the Chief Controller on September 30, 1958, and handed over the explanation to him and also personally told him that in the absence of any particulars of the alleged fraud and without inspection of the papers relied upon by the Chief Controller, it was not possible for the petitioner Company to give a complete explanation and that the petitioners reserved their right to give further explanation on getting the said particulars and inspection of the said papers. They also requested the Chief Controller to give the Company a personal hearing to meet the charges after giving the necessary particulars and the inspection of papers asked for. The Chief Controller told them that the issue of the licences had not been authorized by him as they purported to be and that they had been obtained fraudulently, though at that stage he was not able to say how exactly and by whom the fraud was committed. He also did not give them the particulars of fraud. The Director of the Company suggested that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feeling amongst the employees of the Company. On behalf of the petitioner Company, the Chief Controller was told that it was not possible for the Company to give a complete explanation and that they reserved their right to give further explanation. The petitioners were not allowed inspection of the papers. By their letter dated October 3, 1958, the Company recorded what took place at the said interview and sent it to the Chief Controller. The petitioners again wrote another letter to the Chief Controller reminding him that they had not received any particulars of the alleged fraud. This letter was personally handed over to Mr. Sundaram, the Director of Administration in the Office of the Chief Controller on October 14, 1958. At that interview, Mr. Sundaram told the petitioners that the recommendations against which the disputed licences were granted were not genuine. On October 16, 1958, the Chief Controller cancelled the said five licences issued to the petitioner Company. On the aforesaid facts, which we have assumed for the purpose of this petition, can it be said that the Chief Controller gave the petitioners a "reasonable opportunity of being heard" to enable them to establish that no fraud had been committed in getting the said licences ?

The learned Solicitor-General, appearing for the respondents, contended that the Company admitted the fraud, that their only defence was that the fraud might have been committed by reason of the Gujarati Maharashtrian and anti-Muslim feeling amongst the employees of the Company and that therefore the fact that the Chief Controller told the petitioners that the issue of the licences had not been authorized by him and the fact that Mr. Sundaram told the petitioners on October 14, 1958, that the recommendations against which the disputed licences were granted to the petitioners were not genuine, were, in the circumstances, sufficient disclosure of the particulars of fraud and that, therefore, reasonable opportunity within the meaning of section 25 (1) of the Act had been given to the petitioners. I find it very difficult to accept this argument. The argument assumes that the petitioner-Company accepted the version given by the Chief Controller or by Mr. Sundaram. For the purpose of this petition it must be assumed that the petitioners were innocent. The notice was given to them to show cause why the licences given to them should not be cancel-

led on the ground of fraud. By letters and in person they requested the Chief Controller to give them the particulars of the fraud, and to allow them to inspect the relevant documents so that they might give a further explanation to show cause against the cancellation of the licences. The affidavit filed by the Chief Controller only discloses that he, in his conversation with the Solicitor and the Director of the Company, mentioned to them that he did not issue the licences. In the affidavit he admits that they asked for particulars and for the inspection of the documents ; but he says that the petitioners were told sufficiently what was against them and their demand for the inspection of the papers was mischievous. But what he told them about the particulars of the alleged fraud is, in his own words :—

> "I told them that the issue of the licences had not been authorised by me as they purported to be and that they had been obtained fraudulently, though at that stage I was unable to say how exactly and by whom the fraud was committed."

The conversation with Mr. Sundaram on October 14, 1958, does not carry the matter further. He has not been authorized by the Central Government to make an enquiry and the fact that he told the petitioners that the recommendations against which the disputed licences were granted were not genuine, even if true, does not carry the matter any further. The fact, therefore, remains that notwithstanding specific request by the petitioners no particulars were furnished to them, no facilities for inspection of the relevant documents given and no date was fixed for the enquiry in regard to the alleged fraud.

The learned Solicitor-General asked, what was that that the petitioners could have gained if the particulars were given and if they were allowed to inspect the relevant documents ? This is a lopsided way of looking at things. The question should have been, what reasonable opportunity to be heard was given to the petitioners to establish their innocence ? That apart, without apportioning any blame either on the petitioners or on the respondents, many possibilities can be visualized, *viz.*, (i) the petitioners were guilty of fraud ; they knew that their applications were rejected by the Chief Controller, they got similar applications surreptitiously introduced in the Bombay Office with forged recommendations under the signature of the Deputy Chief Controller, New Delhi, Mr. M. L. Gupta, and obtained the licences by practising fraud on the Joint Chief Controller, Bombay ; (ii) a third party, presumably a rival business-man or members of the staff of the Company, evolved a complicated scheme of fraud to cause damage to the Company and their reputation ; the Company's enemies came to know that the applications of the Company were rejected, then forged fresh applications, got them surreptitiously introduced in the Bombay Office and got the licences issued in favour of the petitioners : this is a rather far-fetched theory ; (iii) after the applications were rejected, fresh applications were filed in the New Delhi Office, got forwarded to the Joint Chief Controller, Bombay, with the directions issued by the Deputy Chief Controller, New Delhi ; (iv) the original applications field by the Company were ordered, and not rejected, by the Chief Controller or his Deputy and they were sent in due course along with the recommendations duly signed by the Deputy Chief Controller to the Joint Controller, Bombay, and that the licences were issued in the usual course; the Office of the Chief Controller, New Delhi, after realizing that licences were issued contrary to rules or orders that licences should not be issued in respect of goods to be imported from soft currency areas, set up a false case of the original applications being rejected and the fresh applications substituted in the Bombay Office. The aforesaid are some of the possibilities and there may be many others. When notice was issued to the petitioners on the ground of fraud, they were certainly entitled to the particulars thereof. The Chief Controller could have given the following particulars; (i) the petitioners' applications were rejected on a particular date ; (ii) the orders of rejection were communicated to them on a particular date ; (iii) that he did not issue any letters to the petitioners as regards the forwarding of their applications or the recommendations to the Joint Chief Controller, Bombay ; (iv) after the rejection of their applications, the Office of the Chief Controller did not receive any letters from the petitioners ; (v) that the applications on which the licences were issued were not the same applications sent to the Delhi Office; (vi) that the signature of Mr. M. L. Gupta

was forged and (vii) that there is nothing in the Bombay Office to show that they received any applications from the Delhi Office. If these particulars were given to the petitioners, they might have by inspecting the documents proved that there was no fraud, that there was no order rejecting the applications, that the despatch book showed that the applications were forwarded to the Bombay Office and that the original applications were not in that Office, that the despatch book and the receipt book showed the correspondence that passed between the Chief Controller and the petitioners, and that the signature of Mr. Gupta on the recommendations was genuine. It is not as if the petitioners admitted that they committed the fraud. When they were confronted with the notice, unless the particulars were given to them and the documents shown to them, it was not possible for them to know whether a fraud was committed at all and, if committed, how was it committed. Only for the purpose of explaining that no fraud was committed by them, they asked for the particulars, for inspection of the relevant documents and for a personal hearing ; all these were denied to them. In the circumstances, I find it not possible to hold that the petitioners were given reasonable opportunity of being heard within the meaning of clause 10 of the Order. The stakes are high and the order of cancellation was made arbitrarily and in utter disregard of the principles of natural justice. I should not be understood to have expressed any opinion on the merits of the case. It may be, or it may not be, that the petitioners were guilty of fraud ; but they should have been given a reasonable opportunity of being heard before they were condemned as having committed the fraud and their licences were cancelled. I, therefore, direct the issue of a writ of *certiorari* quashing the order of the Chief Controller cancelling the licences granted to the petitioners.

ORDER.—In accordance with the opinion of the majority the Petition is dismissed with costs.

Petition dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. R. DAS, *Chief Justice*, N. H. BHAGWATI AND M. HIDAYATULLAH, JJ.

The Commissioner of Income-tax, West Bengal .. *Appellant**

v.

Kalu Babu Lal Chand .. *Respondent.*

Income-tax Act (XI of 1922), section 10—Karta of Hindu joint family becoming partner of firm and managing director of company which took over the business—Remuneration earned by—If income of joint family for purposes of assessment to income-tax.

If for the purpose of contribution of his share of the Capital in the firm the karta of a joint Hindu family brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family.

Where the promotion of a company and taking over a concern (of which *R* the Karta of a Hindu joint family was a partner) and the financing of it were all done with the help of the joint family funds and *R* did not contribute anything out of his personal funds if any, the managing director's remuneration received by *R* was, as between him and the Hindu undivided family, the income of the latter and should be assessed in its hands.

The acquisition of the business, the floatation of the company and the appointment of the managing director are inseperably linked together. The joint family assets were used for acquiring the concern and for financing it and in lieu of all that detriment to the joint family properties the joint family got not only the shares standing in the names of the Karta and his brother but also, as part and parcel of the same scheme, the managing directorship of the company when incorporated.

Appeal by Special Leave from the Judgment and Order, dated the 8th September, 1955, of the Calcutta High Court in Income-tax Reference No. 77 of 1951.

* C.A. No. 431 of 1957. 15th May, 1959.

C. K. Daphtary, Solicitor-General of India (*Ganapathy Iyer* and *D. Gupta*, Advocates, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*B. Sen Gupta* and *D. N. Mukherjee*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das, C.J.—This appeal by Special Leave is directed against the order of the High Court of Calcutta passed on September 8, 1955, on a reference made by the Income-Tax Appellate Tribunal under section 66 (1) of the Indian Income-Tax Act whereby the High Court answered the first question referred to it in the negative and the second question in favour of the respondent assessee. The facts leading up to the present appeal are briefly as hereinafter narrated.

The respondent was at all material times a Hindu undivided family of which one B. K. Rohatgi was the eldest male member and as such its *karta*. It appears that in 1930 the said B. K. Rohatgi became interested in a concern called the India Electric Works carried on by Milkhi Ram and other persons none of whom was a member of the assessee family. Evidently it was decided that a Company would be floated, *inter alia*, for the purpose of acquiring and taking over the said India Electric Works as a going concern. The said B. K. Rohatgi was one of the promoters of that Company. Pursuant to an agreement with the vendors of the business of India Electric Works the said B. K. Rohatgi, as such promoter as aforesaid and on behalf of the said Company then to be formed, took over the said business as a going concern on and from March 1, 1930, and carried on the same since then until December 19, 1930, when the contemplated Company was eventually incorporated under the Indian Companies Act as a private company with limited liability under the name of India Electric Works Ltd. (hereinafter called "the said Company".)

Article 132 of the Articles of Association of the said Company provided that the first Managing Director would be the said B. K. Rohatgi or "his assigns or successors in business whether under his name or any other style or firm" and that the said B. K. Rohatgi would continue to be the Managing Director until he would resign or be found guilty of any act of fraud or dishonesty or be removed in the manner thereinafter provided. Article 133 laid down the circumstances in which and the conditions on which the Managing Director might be removed. Article 135 provided for the remuneration of the Managing Director which was fixed at Rs. 6,000 per annum or a commission of 15 per cent. on the net profits of the Company to be computed in the manner therein mentioned. The powers of the Managing Director were enumerated in Article 136 under twenty sub-heads. Article 138 provided that the Company should "forthwith enter into an agreement under the seal with Mr. Benoy Krishna Rohatgi in terms of the draft which has been approved on behalf of the Company". For some reason or other, not apparent on the record, it was not till January 31, 1934, that an agreement was actually entered into between the said Company and the said B. K. Rohatgi. The terms and conditions contained in the agreement and the powers and authorities conferred thereby on B. K. Rohatgi were in substance the same as those mentioned in the Articles of Association referred to above.

Of the total 950 ordinary shares of Rs. 500 each issued and subscribed, 326 shares stood in the name of the said B. K. Rohatgi, 356 shares in the name of his brother R. K. Rohatgi and 10 shares in the name of one Laxminarain said to be an employee of the assessee-family. There is no dispute that prior to the accounting year relevant to the assessment year 1943-44 the Managing Director's remuneration received by the said B. K. Rohatgi was credited in the books of the Hindu undivided family just as the dividends on the shares held in the names of his brother and of himself had been done. In paragraph 6 of the Statement of the Case it is stated :—

1. (1947) 15 I.T.R. 124.

"It was not denied by the Assessee that India Electric Works Limited was floated mainly with the funds provided by the Assessee and Mr. Rohatgi made no contribution in this respect. Further, all along its career Indian Electric Works Limited was financecd from time to time by the Assessee Hindu Undivided Family. It was further found that it was for the first time in the year of assessment that the Assessee claimed that the remuneration belonged to Mr. Rohatgi personally. Up to 1942-43 assessment all along both Mr. Rohatgi and the Hindu Undivided Family Assessee in their accounts treated the whole of the remuneration paid to Mr. Rohatgi as the income of the Hindu Undivided Family."

In the accounting year relevant to the assessment year 1943-44 the Managing Director's remuneration received by B. K. Rohatgi amounted to Rs. 61,282 and during the 1943-44 assessment proceedings it was claimed that the whole of it was the personal earnings of the said B. K. Rohatgi and should not be added to the income of the Hindu undivided family which is the respondent before us.

The Income-tax Officer rejected this claim. On appeal to the Appellate Assistant Commissioner, the latter concurred with the view of the Income-tax Officer. The assessee went up on further appeal to the Income-tax Appellate Tribunal. The Tribunal struck a middle course. It held that Rs. 61,282 was made up of two kinds of remuneration, namely (1) remuneration for services rendered by the assessee family in the floatation and financing of the said Company and (2) remuneration for the personal services of the said B. K. Rohatgi. The Tribunal, therefore, apportioned the amount received between the two categories of remuneration and allocated Rs. 30,000 computed at the rate of Rs. 2,500 per month to the personal services of the said B. K. Rohatgi and the rest to the remuneration due to the services of the assessee family.

On the application of the respondent-assessee the Tribunal made a reference under section 66 (1) of the Indian Income-tax Act and the questions referred were as follows :—

"(1) Whether on the facts and in the circumstances of this case, the Income-tax Appellate Tribunal was justified in apportioning the sum of Rs. 61,282 into two parts assessing one in the hands of the Assessee Hindu undivided family and the other in the hands of Mr. B. K. Rohatgi ?

(2) If the answer to the above question be in the negative whether the assessment of the said um of Rs. 61,282 should be on Mr. Rohatgi personally or on the Assessee Hindu undivided family?"

When the reference came up before the High Court for hearing, the learned Judges felt that the statement of case submitted by the Tribunal was inadequate and that it would not be possible for the Court to answer the questions unless certain other facts were clearly stated. The High Court accordingly directed the Tribunal to submit a further statement of case and to include therein answers to the following questions :—

"(*a*) With whose funds were the shares, on the strength of which Mr. Rohatgi has been and is the Managing Director, purchased and to whom do they really belong ?

(*b*) Who has been in enjoyment of the dividend paid on those shares ?

(*c*) In what capacity was Mr. Rohatgi originally appointed to and was holding, at the relevant time, the office of the Managing Director of the India Electric Works, Ltd., namely, whether in his personal and individual capacity or otherwise ?

(*d*) Besides the qualifying shares, are there any further shares of the Company standing in the name of Mr. Rohatgi and if there are such shares, with whose funds were such shares acquired and to whom do they really belong ?"

A further statement of case was accordingly submitted by the Tribunal. The Tribunal concluded its findings and expressed its opinion on the questions specifically as follows :—

"*Questions* (*a*), (*b*) and (*d*).—All the shares in the India Electric Works, Limited, standing in the name of Mr. B. K. Rohatgi (326 shares) and Mr. R. K. Rohatgi (356 shares) were acquired with funds belonging to the assessee family and they belong to the family and the family has been in enjoyment of the dividends paid on those shares. Besides the 10 qualifying shares there are 316 more shares in the Company standing in the name of Mr. B. K. Rohatgi and those shares also belong to the assessee family.

Question (*c*).—The answer is a matter of inference from the facts above stated. The Tribunal's conclusion was that Mr. B. K. Rohatgi was originally appointed to and was at the relevant time holding the office of the Managing Director of the India Electric Works, Limited, in his capacity as a member and karta of the assessee family."

Learned counsel appearing before the High Court did not make any attempt to support the Tribunal in its choice of the middle path but conceded that the income was either the income of the family or the personal income of the said B. K. Rohatgi and that there could be no justification for ascribling a portion of it to the remuneration of the said B. K. Rohatgi as an officer of the Company and ascribing the other portion to a return made by the Company to the family for benefits received. The High Court accordingly answered the first question in the negative. As regards the second question, the High Court thought that the case was covered by the decision in the case of *Commissioner of Income-tax, Madras* v. *S. N. N. Sankaralinga Iyer*,[1] and expressed the opinion that the assessment of the said sum of Rs. 61,282 should be on Mr. Rohatgi personally.

Feeling aggrieved by the aforesaid answer, the Commissioner of Income-tax applied for and obtained from this Court Special Leave to appeal to this Court against the order of the High Court. The learned Solicitor-General appearing before us in support of this appeal has not challenged the correctness of the answer given by the High Court to the first question and, therefore, we are now concerned only with the correctness of the answer given by the High Court to the second question.

It is now well settled that a Hindu undivided family cannot as such enter into a contract of partnership with another person or persons. The *karta* of the Hindu undivided family, however may and frequently does enter into partnership with outsiders on behalf and for the benefit of his joint family. But when he does so, the other members of the family do not, *vis-a-vis* the outsiders, become partners in the firm. They cannot interfere in the management of the firm or claim any account of the partnership business or exercise any of the rights of a partner. So far as the outsiders are concerned, it is the *karta* who alone is and is in law recognised as, the partner. Whether in entering into a partnership with outsiders, the *karta* acted in his individual capacity and for his own benefit or he did so as representing his joint family and for its benefit is a question of fact. If for the purpose of contribution of his share of the capital in the firm the *karta* brought in monies out of the till of the Hindu undivided family, then he must be regarded as having entered into the partnership for the benefit of the Hindu undivided family and as between him and the other members of his family he would be accountable for all profits received by him as his share out of the partnership profits and such profits would be assessable as income in the hands of the Hindu undivided family. Reference may be made to the cases of *Kaniram Hazarimull* v. *Commissioner of Income-tax, West Bengal*,[2] and *Dhanwatay, V.D.* v. *Commissioner of Income-tax, Madhya Pradesh and Bhopal*[3], in support of this view. The same principle has been applied to the case of a *karta* appointed as a Treasurer of a Bank and the remuneration received by him for services rendered as such Treasurer has been treated as the income of the Hindu undivided family of which he was the *karta* and was assessed in its hands. The same principle has been extended to the remuneration received by a *karta* as the managing agent of a Company with limited liability (See *Haridas Purshottam*, In re)[4]. Stone C.J., with whom, Chagla, J., agreed, held that as the managing agency was derived from or acquired with the assistance of the joint family property, that is, the mills in which the assessee as *karta* was beneficially interested, the income from the managing agency received by the assessee must be treated as the income of the family of which he was the *karta* Reference is, however, made to certain decisions in support of the contrary view; but those decisions appear to turn on the facts found to be established in those particular cases. Thus, in *Murugappa Chetty* v. *Commissioner of Income-tax, Madras*[5] it had not been established either that the managing agency agreement had, in fact, been obtained by the *karta* for and on behalf of the Hindu undivided family or that the income was earned by utilising the joint family property or utilising it to its detriment. The case of *R. Hanumanthappa* v. *Commissioner of Income-tax, Madras*[6], simply follows *Murugappa Chetty's case*[1], and does not carry the matter any further. As

1. (1950) 1 M.L.J. 443 : 18 I.T.R. 194.
2. (1955) 27 I.T.R. 294.
3. (1957) 32 I.T.R. 682.
4. (1947) 15 I.T.R. 124.
5. (1952) 2 M.L.J. 17 : 21 I.T.R. 311.
6. (1952) 2 M.L.J. 742 : 22 I.T.R. 364.

will be seen hereafter, to the fact established in the case now before us these two decision can have no application.

It is then stated that the position of a Managing Director stands on a footing different from that of a partner or a managing agent and, therefore, the principles applicable to the income derived by a *karta* as a partner or managing agent cannot apply to the remuneration received by the *karta* as the Managing Director of a Company. In the first place it is said that under the Indian Companies Act, a Hindu undivided family cannot, by reason of the definition given in section 2 (9-A) be appointed a managing agent of a Company. In the next place, the office of a managing director, it is urged, involves a personal element and the appointment of a managing director must necessarily be of a particular person for his personal skill and other qualities and therefore, the remuneration received by him must be his personal earnings. Neither of these two considerations appears to us to be tenable. *Vis-a-vis* the Company the managing director is undoubtedly the individual person who is appointed as such. The Company is not concerned with the managing director's Hindu undivided family or the members thereof, just as the outside partners know only the *karta* in his individual capacity as their partner and are not concerned with his Hindu undivided family or its members. The question whether the amount received by the *karta* by way of managing director's remuneration in the one case or as his share of profits in the partnership business in the other case is his personal income or is the income of his Hindu undivided family cannot arise as between the Company and the *karta* as the managing director or between the outside partners and the *karta* as a partner. Neither the company nor the outside partners, as the case may be, is or are interested in such a question. Such question can arise only as between the *karta* and the members of his family and the answer to the question will depend on whether the remuneration or profit was earned with the help of joint family assets. The case of *Sardar Bahadur Indra Singh* v. *Commissioner of Income-tax, Bihar and Orissa*[1], is clearly distinguishable in that it was expressly provided in the Articles of Association of the Company in that case that the remuneration of the managing director would be his personal income. In *Commissioner of Income-tax, Bihar and Orissa* v. *Darsanram*[2], the finding of fact was that the joint family property had not been spent in earning the managing directors remuneration which was, therefore, held to be the personal earnings of the *karta* who had been appointed as the managing director. The case of *Commissioner of Income-tax, Madras* v. *S.N.N. Sankaralinga Iyer*[3], does not help the respondent because of the facts found in that case. In that case it was found that the remuneration of the managing director was earned by him in consideration of the services which he rendered to the bank and no part of the family funds had been spent or utilised for acquiring that remuneration except that the necessary shares to acquire the qualification of a managing director were purchased out of the joint family funds. It was said that there was no detriment to the family property in any manner or to any extent, as admittedly the shares earned dividends which were included in the income of the family. Satyanarayana Rao, J., took the view that on the facts of that case it was impossible to infer that the appointment itself was on behalf and for the benefit of the family ; or in other words, that he became the managing director as representing the undivided family. Viswanatha Sastri, J., in a separate but concurring judgment expressed the view that the mere fact that the assessee had a particular quantity of shares as manager of a joint family did not *ipso facto* enable him to function as the managing director. His personal qualifications were mainly responsible, in addition to the holding of shares, for his selection and appointment as the managing director of the bank. The remuneration, according to the learned Judge, was really *quid pro quo* for the work which he did under the contract of service with the bank. The managing directorship, he held, was in fact a contract of service and it is not as if the family represented by the manager was the managing director. It was the individual that was appointed

1. (1943) 11 I.T.R. 16.
2. (1945) 13 I.T.R. 419.
3. (1950) 1 M.L.J. 443 : 18 I.T.R. 194.

and that was functioning as the managing director. With great respect to the learned Judges, it appears to us that they overlooked the principles laid down by the Judicial Committee in *Gokul Chand* v. *Hukam Chand-Nath Mal*[1], where it was pointed out that there could be no valid distinction between the direct use of the joint family fund and the use which qualified the member to make the gains on his own efforts. The member of the joint family entered into the Indian Civil Service no doubt by reason of his intelligence and other attainments. He certainly entered into a personal agreement with the Secretary of State in Council and he received his salary for rendering his personal service. But all that was made possible by the use of the joint family funds which enabled him to acquire the necessary qualification and that fact made his earnings part of the joint family properties. That apart, those decision do not clearly govern the case now before us.

What are the facts here? Here was the Hindu undivided family of which B. K. Rohatgi was the *karta*. It became interested in the concern then carried on by Milkhi Ram and others under the name of India Electric Works. The *karta* was one of the promoters of the Company which he floated with a view to take over the India Electric Works as a going concern. In anticipation of the incorporation of that Company the *karta* of the family took over the concern, carried it on and supplied the finance at all stages out of the joint family funds and the finding is that he never contributed anything out of his separate property, if he had any. The Articles of Association of the Company provided for the appointment as managing director of the very person who, as the *karta* of the family, had promoted the Company. The acquisition of the business, the floatation of the Company and the appointment of the managing director appear to us to be inseparably linked together. The joint family assets were used for acquiring the concern and for financing it and in lieu of all that detriment to the joint family properties the joint family got not only the shares standing in the name of two members of the family but also, as part and parcel of the same scheme, the managing directorship of the company when incorporated. It is also significant that right up to the accounting year relevant to the assessment year 1943-44 the income was treated as the income of the Hindu undivided family. It is true that there is no question of *res judicata* but the fact that the remuneration was credited to the family is certainly a fact to be taken into consideration. It appears to us that the case is governed by the principles laid down in *Haridas Purshottam's case*[2]. The recitals in the agreement also clearly point to the fact of B. K. Rohatgi having been appointed managing director because of his being a promoter of the company and having actually taken over the concern of India Electric Works from Milkhi Ram and others. The finding in this case is that the promotion of the Company and the taking over of the concern and the financing of it were all done with the help of the joint family funds and the said B. K. Rohatgi did not contribute anything out of his personal funds if any. In the circumstances, we are clearly of opinion that the managing director's remuneration received by B. K. Rohatgi was, as between him and the Hindu undivided family, the income of the latter and should be assessed in its hands. We, therefore, set aside the answer given by the High Court to the second question and answer the same by saying that the assessment of the whole of the sum of Rs. 61,282 should be on the assessee Hindu undivided family. The result is that this appeal is allowed with costs here and in the Court below.

Appeal allowed.

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1. (1921) L.R. 48 I.A. 162 : 40 M.L.J. 327 (P.C.).
2. (1947) 15 I.T.R. 124.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Shri Bhaskar Waman Joshi (deceased) and others .. *Appellants**

v.

Shrinarayan Rambilas Agarwal (deceased) and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale or sale with option to repurchase—Test.

The Legislature added the Proviso to clause (*c*) of section 58 of the Transfer of Property Act in 1929 enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale-deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. The circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase, bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the contents of the deed viewed in the light of surrounding circumstances. If the words are plain and unabiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.

[In the light of the above principles the suit document was held to be a mortgage and not a sale.]

Appeal from the Judgment and Decree, dated the 14th February, 1952, of the former Nagpur High Court in First Appeal No. 10 of 1945 arising out of the Judgment and Decree, dated the 25th September, 1944, of the Second Additional District Judge, Amravati, in Civil Suit No. 11-A of 1943.

C. B. Agarwal, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him) for, Appellants Nos. 1 (*a*) to 1 (*c*).

W. S. Barlingay, Senior Advocate (*S. N. Andley* and *Rameshwar Nath*, Advocates of *Messrs. Rajinder Narain and Co.*, with him), for Respondents Nos. 2-7.

The Judgment of the Court was delivered by

Shah, J.—This is an appeal against the decree of the High Court of Judicature at Nagpur in Civil Appeal No. 10 of 1954 reversing the decree passed by the Second Additional District Judge, Amravati, in Civil Appeal No. 5-A of 1954. The High Court has by its decree directed the Court of first instance to pass a decree for redemption.

The appeal raises a question as to the true effect of a deed, dated September 10, 1931, executed by Shri Narayan Rambilas Agarwal and his two sons Sadan

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* C.A. No. 16 of 1955. 3rd November, 1959.

Gopal and Murli Dhar in favour of two brothers Bhaskar Waman Joshi and Trimbak Waman Joshi. The deed ostensibly conveys an absolute title to certain properties described therein. The transferors under the deed contend that the property transferred by the deed was intended to be mortgaged under a deed of conditional sale. The transferees contend that by the deed an absolute conveyance of the property thereby conveyed was intended and that the conveyance was subject to a condition of repurchase to be exercised within a period of five years from the date of the deed. The Court of first instance dismissed the suit holding that the transaction in the deed, dated September 10, 1931, was of the nature of an absolute of conveyance with a condition of repurchase and the period limited by the deed for reconveyance had expired long before the date of the suit. The High Court held that the transaction was a mortgage by conditional sale and on that view reversed the decree and directed that a redemption decree be passed.

The properties in dispute are three in number: (1) a house in Amravati outside the Amba Gate bearing Municipal No. 5/98; (2) A Chawl in Amravati bearing old Municipal Nos. 6/857, 6/858 and 6/859; and (3) a house situated in Dhanraj Lane, Amravati, bearing old Municipal No. 3/459. By the deed the properties were separately valued. The house at Amba Gate was valued at Rs. 11,500, the Chawl was valued at Rs. 26,000 and the house at Dhanraj Lane was valued at Rs. 2,000. At the date of this transaction, the transferors were indebted to the Imperial Bank of India in the sum of Rs. 30,000 and Rs. 9,500 were due to the transferees and their relations and friends, and to satisfy this liability of Rs. 39,500 the deed was executed. Possession of the property transferred was delivered by calling upon the tenants in occupation to attorn to the transferees. The transferees constructed eight shops in the compound of the Amba Gata house in the year 1940-1941 and made certain other constructions in the compound of the Chawl, and they sold the Dhanraj Lane house to one Suraj Mal Salig Ram. On August 26, 1943, the transferors served a notice upon Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi stating that they were willing to redeem the mortgage created by the deed, dated September 10, 1931, and called upon the transferees "to render full, true and proper account" of the amount claimable under the deed. By their reply Bhaskar Waman Joshi and the representatives of Trimbak Waman Joshi denied that the transferors had any right to redeem the property conveyed by the deed and asserted that the claim "to treat the sale as a mortgage was an afterthought" in view of the abnormal rise in prices which had lately taken place. On September 9, 1943, the three transferors and other members of their joint Hindu family filed suit No. 5-A of 1943 in the Court of the Additional District Judge, Amravati, against Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi and Suraj Mal Salig Ram for a decree for redemption alleging that the transfer incorporated in the deed, dated September 10, 1931, was in the nature of a mortgage by conditional sale.

Exhibit D-1 which is the deed in question recites that the transferors were indebted, that they needed Rs. 39,500 to discharge their liability; that Rs. 2,320 were due to the transferees and that amount was set off and the balance of Rs. 37,180 was paid by eight cheques drawn on the Imperial Bank of India. It was then recited that the immovable properties described in the deed were conveyed in full ownership and that the possession was delivered to the transferees. The deed then proceeded to recite the conditions "in respect of this sale".

"If our heirs or ourselves demand reconveyance of one, two or all the three houses of the above estate at any time within 5 (five) years of this date (this time-limit shall be followed very strictly—it has been finally settled that we will lose this right if one or more day expires), your or your heirs shall reconvey to us at our expenses tbe respective houses for their respective prices mentioned in this deed of sale. With a view that both sides should have equal right in respect of this condition, it has been agreed between us that if our heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or any one of them within four and a half years of this day and if for any reasons you or your heirs do not deem it proper to retain any one or all these houses hereafter, you and your heirs have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs express such a desire and if we or

our heirs fail to compy with it, it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages. It has been (further) agreed between us that in the event of such a reconveyance, our heirs and ourselves will pay full prices (as mentioned in this deed of sale) of the estate in the condition in which it may be at that time, that is, in the condition in which it may be on account of heavenly mishap or Government action, on account of any reason whatsoever or on account of fall in prices."

The Courts below differed in their interpretation of the true effect of these conditions. In the view of the learned trial Judge, the intention of the parties was to effect an absolute sale and not a mortgage. The High Court did not agree with that view.

By clause (*c*) of section 58 of the Transfer of Property Act, mortgage by conditional sale is defined as follows :

" Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by onditional sale :

Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale."

The Proviso to this clause was added by Act XX of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanagerji* v. *Panuganti Parthasaradhi and others*[1], the circumstance that the transction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed,

1. (1924) 47 M.L.J. 809 : L.R. 51 I.A. 305 : I.L.R. 47 Mad. 729 (P.C.).

the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance ; but evidence as to subsequent conduct of the parties is inadmissible.

In the light of these principles the real character of the document Exhibit D-1 may be ascertained. The conditions of reconveyance may be analysed :

(1) that the transferees shall reconvey the properties within five years from the date of the conveyance to the transferor at the expense of the transferors for the price mentioned in the deed ; (2) that if within four years and six months from the date of the conveyance, the right of reconveyance in respect of the three houses or any of them is not exercised by the transferors and if the transferees do not desire to retain all or any of the houses, they have the right to recall from the transferors the amount of the consideration and to return all or any of the three houses in the condition in which they may be ; (3) that in the event of failure on the part of the transferors to comply with the request to take back the houses, a breach of agreement, of reconveyance rendering the transferors liable to pay damages shall be committed; (4) that in the event of reconveyance the transferors shall pay the full price set out in the sale deed and take back the houses in the condition in which by *vis major*, Government action or any reason whatsoever they may be. Evidently the transferors have under the deed a right to call upon the transferees to reconvey the properties within five years from the date of the conveyance ; but after the expiry of four years and six months the transferees are given the option to call upon the transferors to take back all or any of the properties for the prices mentioned in the deed ; and if such right was exercised the transferors were bound to take back the properties and return the price even if on account of *vis major* or action of the public authorities the property was prejudicially affected. The deed does not set out the period within which this right is to be exercised by the transferees. Granting that the option of reconveying the properties against the price mentioned in the deed was to be exercised by the transferors before the expiry of five years from the date of the deed, the covenant that damage to property even on account of circumstances over which the transferees had no control was in the event of reconveyance to be borne by the transferors, is strongly indicative of a mortgage. By this covenant the transferees were invested with the right to call upon the transferors to "take back" all or any of the houses and to return the price therefor; indicating thereby that the price paid is in truth charged upon the property. By calling upon the tenants to attorn to the transferees, possession of the property transferred was delivered and pursuant to the transfer, it was mutated in the names of the transferees. By an express covenant the period of five years was also made of the essence of the contract but as observed in *Narasingerji's case*[1], the description of the document as one of an absolute sale and the right of repurchase bearing the appearance of a right in relation to the exercise of which time is of the essence are not decisive of the true nature of the transaction.

The circumstances surrounding the deed at the date of the execution of the deed also support the view that the transaction incorporated in Exhibit D-1 was intended to be a mortgage. Before the execution of the deed Exhibit D-1 a draft sale deed was prepared. By the draft sale deed Exhibit P-13, only two properties, the Amba Gate house valued at Rs. 10,000 and the Chawl valued at Rs. 25,000 were to be conveyed. By the final sale deed, the Dhanraj Lane house was also agreed to be conveyed and that house was valued at Rs. 3,500. The transferors were evidently in straitened circumstances and immediately needed Rs. 30,000 to discharge their liability to the Imperial Bank ; and the liability to the transferees and

1. (1924) 47 M.L.J. 809 : L.R. 51 I.A. 305 : I.L.R. 47 Mad. 729 (P.C.).

their relations and friends amounted to Rs. 9,500. It is for this amount of Rs. 39,500 that the properties were conveyed. On the date on which the deed was executed, also an agreement Exhibit D-3 was executed by the three transferors. That agreement recited that the sale deed was to be executed for past debts and for paying off the debts cheques were taken from the transferees and the transferees were put in possession of the houses sold. A request was then made that the transferees should not get the deed registered for two months or at least for eight to fifteen days, because the transferees had to make arrangements for payment to the creditors and in the event of the deed being registered, other creditors may make demands for their dues. It was then stated,

"you want that you should get an income of nine per cent. per annum from these houses till reconveyance but it is evident that after meeting repairing or insurance charges thereof, there will not remaln so much profit in balance. Therefore, we have already agreed before that the agreement of reconveyance mentioned in the deed of sale shall be brought into effect only when ourselves or our heirs pay to you all the expenses incurred by you as found due according to your account-books and complete your (nine) per cent ".

This agreement and the sale deed were executed on the same day. Evidently by this agreement the transferors undertook to pay the difference between the net rent to be recovered and interest at the rate of nine per cent. on the price till the date of reconveyance, and that the right of reconveyance was to be enforceable only when the difference between the interest at nine per cent. on the price and the rent recovered less repairs, insurance charges according to the books of account of the transferees was paid. *Prima facie* this is a personal covenant whereby the transferors agreed to pay interest at the rate of nine per cent. on the price paid till the date of reconveyance. This agreement strongly indicates that the parties regarded the arrangement incorporated in the deed, dated September 10, 1931, as a mortgage. The contention raised by the transferees that by this covenant they were to erect additional structures at their own expense upon the land and collect rent which may be equivalent to interest at the rate of nine per cent. on the price paid and the amounts spent by them is on the language used in the deed unwarranted. There is in the deed no reference to any additional amount to be spent by the transferees for erecting buildings upon the land conveyed ; and the books of the transferees are referred to in the agreement only to make the accounts maintained by them binding upon the transferors. Counsel for the transferees urged that this agreement not being registered was inadmissible in evidence. *Ex facie* the document does not purport to create, declare, limit or extinguish any right, title or interest in immoveable property ; it incorporates a mere personal covenant and it is difficult to appreciate the plea that the document is wholly inadmissible for want of registration. This agreement indisputably contains a condition relating to reconveyance incorporated in a registered instrument and may not be admissible in the absence of registration as evidencing any alteration of the terms of reconveyance. But this agreement in so far as it evidences a personal covenant to pay interest at the rate specified, is admissible. It is a somewhat singular circumstance that before the High Court, when counsel for the contending parties were invited by the Court to argue whether the document was by law required to be registered counsel urged that the document was admissible in evidence without registration and insisted upon arguing the case on that footing.

The question whether the price paid was adequate may also be adverted to. The Court of first instance held that the consideration for the properties was not inadequate ; but in the view of the High Court the consideration was wholly inadequate. Counsel for the transferees contended that the monthly rent received from the tenants occupying the properties was Rs. 270 and deducting therefrom Rs. 48 for municipal taxes and an amount equal to rent for two months as properly chargeable for repairs, insurance and collection charges, there remained only a balance of Rs. 186 per month available to the transferees and capitalising the net rent at 6 per cent. the value of the property conveyed could not exceed Rs. 30,000 and even capitalising the net rent at 5 per cent. counsel contended that the value of the property may be approximately equal to the consideration paid. There is, however, no clear evidence as to what municipal taxes were payable in respect of the houses, and whether the taxes were

payable by the tenants or by the landlord. Dr. Trimbak Joshi one of the transferees in his evidence in Suit No. 112 of 1932 deposed " that the tax came to Rs. 48 on the date of purchase ", but he did not state that this amount was payable monthly. There is again evidence of witness Balkrishna examined by the transferees that the water tax was paid by the tenants. In their written statement, the transferees had set out a statement of income and expenditure for the years 1931-1940 and in that statement for the year 1933 the expenses debited against income were Rs. 426-11-0, for 1934 Rs. 346-15-6, and for 1935 Rs. 542-2-6, for 1936 Rs. 1,666-7-0, for 1937 Rs. 1,116-1-3, for 1938 Rs. 529-2-3, for 1939 Rs. 570-11-3, and for 1940 Rs. 46-2-0. If Rs. 48 were payable as municipal tax every month, the liability on account of taxes alone far exceeded the expenses debited against the rent received. This statement of account abundantly shows that the municipal taxes were borne by the tenants and not by the landlords. The High Court in para. 34 of its judgment proceeded to estimate the rental of the properties at Rs. 245 per month and capitalised the same at 5 per cent. The High Court is not shown to be in error in accepting the net monthly rental at Rs. 245 per month.

The area of the land of the Amba Gate House is 9037 square feet, the area of the land at Chawl is 23805 square feet, and the area of land of Dhanraj Lane house is 817 square feet. There is no clear evidence on the record about the precise area of the lands covered by the structures, but it is conceded that the structures stood on an area less than one-half of the total area of the land. From the evidence especially of the valuation reports, it appears that of the Amba Gate house 5800 square feet of land were open and of the Chawl 12000 square feet of land were open. Valuation of building land with structures by capitalising the rental may yield a reliable basis for ascertaining the value of the land together with the structures only if the land is developed to its full capacity by erection of structures. If the land is not fully developed by raising structures, valuation of houses together with lands by capitalising the rent received may not furnish reliable data for assessing the market value. By aggregating the value of the land and the value of the structure separately estimated, a scientifically accurate value of the land with the structure may not be obtained. But where the land is relatively valuable and the structures are old and comparatively of small value, this method may afford a rough basis in the absence of other reliable data for ascertaining the value of the land and the structure. Exhibits D-52 and D-53 are the reports prepared by a valuer, of the market value of the Chawl and the Amba Gate house. According to the report Exhibit D-52, the value of the superstructure of the Chawl was Rs. 31,708. Out of this amount the valuer sought to deduct 20 per cent. " as per Superintending Engineer's letter, dated the 21st August, 1931 ". On what basis that deduction has been made has not been explained. He again proceeded to deduct 20 per cent. as depreciation on the cost of the building and estimated at Rs. 20,293 the value of the superstructure. It is evident that a deliberate attempt was made by the valuer to depreciate the value of the superstructure by making at least one deduction of 20 per cent. for which there is no warrant. Even assuming that this valuation of Rs. 20,293 is accurate, the value of the Chawl together with the land considerably exceeds Rs. 26,000. The valuer has valued the site at 4 as. per square foot, but no reliable evidence has been led to support that estimate. Similarly for the Amba Gate house the valuer estimated the value at Rs. 18,556 for the superstructure and he deducted 20 per cent. " with effect from the 22nd August, 1931, according to the Superintending Engineer's letter, dated the 21st August, 1931 " and 25 per cent. as depreciation charges on building and arrived at the figure of Rs. 11,134 and added thereto the value of the land at the rate of 4 as. per square foot. The evidence on the record does not warrant the assumption that the land was worth only annas four per square foot. As pointed out by the High Court in view of the sale deeds Exhibits P-9 and P-21 the price of the land fluctuated between Re. 1 and Rs. 2 as. 4 per square foot. Even if the lower of the two rates be adopted, the value of the Chawl and the Amba Gate house will considerably exceed the price embodied in the sale deed.

The house in Dhanraj Lane was valued in the draft sale deed at Rs. 3,500 and in the sale deed at Rs. 2,000. No explanation has been given for this disparity between the prices mentioned in the draft and the sale deed and there is substance in the contention strongly pressed by counsel for the transferors that the value of Rs. 2,000 for a house with a ground floor and two stories is artificial. The evidence discloses that the house was let out on a monthly rent of Rs. 20 and capitalising that rent at 5 per cent. on the assumption that by the construction the land was fully developed, the price thereof was more than double the price set out in the deed. It is clear that this house was included in the deed to make up the total value of Rs. 39,500 the amount required by the transaferors to tide over their immediate difficulties.

Counsel for the transferees sought to rely upon the evidence of subsequent conduct of the transferors as indicative of the character of the transaction as a sale, but as already observed, that evidence is iadmissible.

In our view, the High Court was right in holding that the real transaction incorporated in Exhibit D-1 was a mortgage and not a sale. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

The Official Liquidators, U. P. Union Bank Ltd. (In Liquidation) .. *Appellants**

v.

Sh. Rameshwar Nath Agarwal .. *Respondent.*

Companies Act (VII of 1913), section 230—Property continuing to remain in possession of liquidator—Rent due to landlord—When entitled to priority—Company Rules, rule 97—Scope.

Where the properties have not remained with the liquidators for the purpose of liquidation, unless the Court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts. It cannot be said that under rule 97 of the Company Rules, if the property remained in the occupation of the liquidators not for the purposes of winding up, the landlord is entitled to priority in respect of payment of rent.

Appeal from the Judgment and Order, dated the 17th April, 1956, of the Allahabad High Court in Special Appeal No. 20 of 1954 arising out of the Judgment and Order, dated the 10th February, 1954, of the said High Court (Company Jurisdiction) in Application No. 29 of 1953—Company Case No. 24 of 1949.

H. N. Sanyal, Additional Solicitor-General of India (*N. C. Sen,* Advocate, with him) for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*Mrs. E. Udayaratnam* and *S. S. Shukla,* Advocates, with him) for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The U.P. Union Bank Ltd., (which will hereinafter be referred to as the Bank) was in occupation as a tenant of a building in Agra town belonging to the respondent at a monthly rental of Rs. 325 and Rs. 10 as municipal taxes. The Bank made default in paying the rent accruing due and the respondent filed Suit No. 810 of 1949 in the Court of the Munsif at Agra for a decree for rent for three months and obtained an order of attachment before judgment on the movable property of the Bank. The Munsiff, by his decree, dated December 2, 1949, decreed the suit and confirmed the order of attachment before judgment. In the meanwhile, on a petition, dated September 13, 1949, the Bank was ordered to be wound by the High Court

* C.A. No. 28 of 1958. 10th November, 1959.

of Judicature at Allahabad and the appellants were appointed liquidators of the Bank. The employees of the Bank had vacated the premises on September 10, 1949, but the property of the Bank which was attached was, with the consent of the respondent, stored by the Commissioner appointed by the Munsiff's Court in the Banking hall which was sealed by that officer. A part of the premises was, it appears, occupied by some trespassers. The Official Liquidators called upon the respondent to take possession of the premises, but the latter declined to do so unless vacant possession of the entire premises was given to him. On November 30, 1950, the respondent applied to the High Court for permission to file a suit for ejectment and for arrears of rent due since September 30, 1949. Mr. Justice Mootham, who heard the application, declined to grant permission holding that the claim which the respondent intended to put forward against the Official Liquidators in the course of the proposed suit may be adjudicated upon in the winding up proceeding, and with the consent of parties, the learned Judge proceeded to decide that claim. By Order, dated August 30, 1951, Mr. Justice Mootham directed as follows :—

"In the result.........I hold that the petitioner is entitled to recover rent from the Bank at the rate of Rs. 325 per mensem from 1st October, 1949, upto the date on which the Official Liquidators give the petitioner (the landlord) such possession of the premises as will, in law, terminate the Bank's tenancy."

Against this order, the Official Liquidators preferred an appeal being Special Appeal No. 17 of 1952 to a Division Bench of the High Court.

On April 23, 1953, the respondent applied to the Joint Registrar of the High Court to issue a certificate of non-satisfaction and to transfer the order to the Court of the Civil Judge of Allahabad for execution. The Joint Registrar issued a certificate of non-satisfaction of the order and directed that the same be transmitted to the District Judge, Allahabad, for execution. The respondent filed an application for execution in the Court of the Civil Judge, Allahabad and obtained an order for attachment of an amount of Rs. 12,000 lying to the credit of the Official Liquidators in the Allahabad Bank. The Official Liquidators thereupon applied to the High Court praying that the execution proceeding pending in the Court of the Civil Judge, Allahabad, be declared void and the order of attachment of the fund in the account of the Official Liquidators passed by the Civil Judge be qusahed. Mr. Justice Brij Mohan Lall who heard the application held that the proceeding commenced against the Official Liquidators, without the sanction of the Court under sections 171 and 232, clause (1) of the Indian Companies Act, 1913 and the attachment ordered thereunder were void and directed that the certificate of non-satisfaction be recalled. Against this order, the respondent preferred a special appeal to the High Court being Appeal No. 20 of 1954. Appeals Nos. 17 of 1952 and 20 of 1954 were then heard. Appeal No. 17 of 1952 was dismissed and by an order passed on April 17, 1956, the High Court partially modified the order of Mr. Justice Brij Mohan Lal and directed the Official Liquidators to pay to the respondent in full the amount that had fallen due to him after October 1, 1949.

The High Court was of the view that the Official Liquidators having retained the Bank's premises in their occupation, by virtue of the Proviso to rule 97 framed by the High Court, the respondent was entitled to receive the rent due to him in full and was not liable to share the assets of the Bank *pro rata* with the other ordinary creditors. Against the order passed by the High Court, this appeal has been preferred with the certificate of the High Court.

By his order Mr. Justice Mootham merely declared the liability of the Bank to pay the rent accrued due since October 1, 1949 ; there is no direction for payment of the amount, and it is not necessary to consider the plea raised by counsel for the respondent that the order being virtually one under section 45-B of the Banking Companies Act, the respondent was entitled to payment according to the tenor of the order. The order in terms declares the liability and does not decide any question of priority between the respondent and other creditors of the Bank.

By section 647 of the Companies Act No. I of 1956, the winding up of the Bank having commenced before that Act was enacted, the provisions with respect to the

winding up contained in the Indian Companies Act No. VII of 1913 continue to apply to the Bank in the same manner and in the same circumstances as if Act I of 1956 had not been passed. By section 230 of the Indian Companies Act, 1913, provision is made for payment of specified categories of debts in the winding up in priority to all other debts; but rent due to the landlord is not one of such debts to which priority is given by section 230. The High Court held that inasmuch as by rule 97 of the Company Rules, it was provided ;

"When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of such periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding up order or resolution as if the rent or payment grew due from day to day :

Provided that where the Official Liquidator remains in occupation of premises demised to a company which is being wound up, nothing herein contained shall prejudice or affect the right of the landlord of such premises to claim payment by the company, or the Official Liquidator of rent during the period of the company's or the Official Liquidator's occupation ;"

for the rent accruing due in respect of the premises which remained in the occupation of the Official Liquidators, the respondent was entitled to preferential payment. The operative part of the rule deals with the rent or other payment in arrears till the date of winding up. By the Proviso, it is declared that the right of the landlord to claim payment by the company of the rent accruing due thereafter is not to be prejudiced. The Proviso merely affirms the right of the landlord to claim payment of rent accruing due since the date of winding up. It does not deal with any question of priority in payment of debts. By section 246 of the Indian Companies Act, 1913, power is conferred upon the High Court to make rules consistent with the Act and the Code of Civil Procedure concerning the mode of proceedings to be had for winding up of the company and certain other matters. The Legislature has by section 230 prescribed that certain specified categories of debts shall rank for priority over other debts due by the company and it is not within the competence of the High Court to prescribe by rule a category for priority in payment which is not included in that section. By section 193 of the Act, the Court has, in the event of the assets being insufficient to satisfy the liabilities, indisputably power to make an order for payment out of the assets, of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks fit, and in exercise of the power conferred by section 230, sub-clause (3), the Court may direct the company to retain such sums as may be necessary for the costs and expenses of the winding up of the company before discharging even the debts in respect of which priority is prescribed by section 230. If, therefore, there is a debt which may reasonably fall within the description of costs and expenses of winding up of the company, the Court may provide for priority in payment of that debt as it thinks just.

In the winding up of the company, it is open to the liquidators to disclaim land burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable. The disclaimer operates to determine as from the date of disclaimer the rights, interests and liabilities of the company and the property of the company, in or in respect of the property disclaimed. By section 230-A, clause (4), liberty is reserved to persons interested in the property requiring the liquidator to decide whether he will or will not disclaim. It is also open to the Court under sub-section (5) of section 230-A on the application of any person entitled to the benefit or subject to the burden of a contract made with the company to make an order rescinding the contract on such terms as to payment of damages for non-performance of contracts. It is evident that on the winding up outstanding contracts of the company do not become *ipso facto* inoperative. The contracts remain binding until disclaimed or rescinded in the manner provided by section 230-A ; but the liability incurred under these contracts is merely an ordinary debt which ranks for claim to payment *pro rata* along with other creditors. If the debt be regarded reasonably as falling within the description of costs and expenses of winding up of the company, it is open to the Court to direct that preferential payment in respect thereof be made ; otherwise the debt will be claimable out of the assets of the company *pro rata* with other ordinary creditors.

Distinction has been made by the Courts in England where the relevant provisions of the Companies Act are substantially the same that if the liquidator continues in possession of leaseholds for the purpose of the better realization of assets, the lessor will be entitled to payment of the rent in full, as part of the expenses properly incurred by the liquidator ; but as observed by Lord Justice Lindley, *In re Oak Pits Colliery Company*[1];

"No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee."

Evidently a distinction is made between property which remains in the occupation of the liquidator after the winding up when the occupation is shown to be for the purpose of liquidation and property which merely remain with the liquidator, he having abstained from trying to get rid of the same and it does not appear or is not shown that the property was used for the purpose of winding up.

The High Court held on the facts that the liquidators had remained in occupation of the premises not for the purpose of winding up but "because they could not think of any suitable method of getting rid of the premises in spite of all their desire to do so ". It was pointed out that the Bank had closed its business and the liquidators were not carrying on any business after the winding up and the properties were not used by the liquidators for the purpose of liquidation. This conclusion of the High Court on the evidence has not been challenged. The property not having remained with the liquidators for the purpose of liquidation, unless the Court passes an order holding that the debt incurred was part of the costs and expenses of liquidation, the rent accruing due since the date of the winding up cannot be claimed in priority over other ordinary debts.

We are, therefore, unable to agree with the High Court that under rule 97 of the Company Rules, if the premises remained in the ocupation of the liquidators, not for the purpose of winding up, the landlord is entitled to priority in respect of payment of rent. On the view taken by us, the appeal will be allowed, the order passed by the High Court set aside and the order passed by Mr. Justice Brij Mohan Lall restored with costs in this Court and in the High Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Jibon Krishna Mukherjee and another .. *Appellants**

v.

New Beerbhum Coal Co., Ltd. .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order*, 21, *rule* 89—*If applies to a sale held by a receiver appointed by the Court in execution and authorised to sell the property.*

Order 21, rule 89, of the Civil Procedure Code, does not apply to a sale held by a receiver appointed by the Cout in execution of a decree and authorised to sell the property.

Appeal by Special Leave from the Judgment and Decree, dated the 29th April, 1959, of the Calcutta High Court in Appeal from Original Order No. 188 of 1958.

H. N. Sanyal, Additional Solicitor-General of India (*T. S. Venkatrama*, *K. R. Sharma* and *K. R. Chaudhry*, Advocates, with him), for Appellants.

S. N. Mukherjee, Advocate, for Respondent No. 1.

N. C. Chatterjee, Senior Advocate, (*S. K. Acharyya* and *R. S. Narula*, Advocates, with him) for Respondent No. 2.

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1. L.R. (1882) Ch. D. 321 at 331.

* C.A. No. 342 of 1959. 10th November, 1959.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which this appeal by Special Leave raises for our decision is ; Whether the provisions of Order 21, rule 89, of the Code of Civil Procedure, apply to a sale held by a receiver appointed by the Court and authorised to sell the property in question. The learned Single Judge on the Original Side of the Calcutta High Court as well as the Division Bench of the said High Court have answered this question in the negative. The appellants contend that the view taken by the Calcutta High Court is erroneous.

This question arises in this way. In Suit No. 1024 of 1953 on the Original Side of the Calcutta High Court a decree for the payment of Rs. 18,497-15-0 was passed by consent in favour of the New Bheerbhum Coal Co., Ltd., (hereinafter called respondent 1) and against the Banaras Ice Factory Ltd., (hereinafter called appellant 2) on December 5, 1955. The decree provided for the payment of the decretal amount by six equal instalments and it directed that in case of default of any one of the instalments the balance of the decretal dues would at once become payable. A first charge was created by the decree on the plant and machinery of appellant 2 for securing the payment of the decretal amount. A default having occurred in the payment of instalments respondent 1 applied for the execution of the decree on April 10, 1956. On this application an interim order was made on May 17, 1956, appointing Mr. A.K. Sen as Receiver of the properties charged. The said application was finally decided by an order passed on May 30, 1956, by which the appointment of the receiver was confirmed and he was given liberty to sell the said properties either by private treaty or by public auction. It is common ground that the receiver took possession of the said property in December, 1956.

Subsequently, on March 10, 1958, the receiver entered into an agreement with Sukhlal Amarchand Vadnagra (hereinafter called respondent 2) for the sale of the said property for Rs. 30,000. The terms and conditions embodied in the said agreement provided *inter alia* that within one month from the date of the receipt by the purchaser of intimation from the receiver that the sale had been confirmed by the High Court the purchaser shall deposit with the said receiver the full price of Rs. 30,000. On March 31, 1958, respondent 1 applied to the Court for confirmation of the said agreement and on May 9, 1958, G. K. Mitter, J., allowed the application. He ordered that the appellants should deposit the sum of Rs. 3,000 with the attorneys of the decree-holder towards its claim under the said decree and further directed that if the said amount was paid within the time aforesaid and the balance of the decretal amount was paid within ten weeks thereafter the agreement of sale shall not be confirmed. The order further provided that in default of the appellants paying the amounts as directed within the respective due dates the sale of the charged property by the receiver to the second respondent as set out in the agreement shall be confirmed.

Pursuant to this order the appellants deposited with the attorneys of the decree-holder Rs. 3,000 on May 30, 1958. They had also paid to the receiver Rs. 3,500 in August, 1957, towards the decretal dues. It appears that when the appellants were unable to pay the balance as directed by the Court appellant 2 applied to the Court praying that the agreement of sale should be cancelled and the time within which he was directed to pay the balance of the decretal amount should be extended. The application also sought for certain other directions. G.K. Mitter J., who heard this application dismissed it on July 29, 1958, and confirmed the agreement of sale.

On August 20, 1958, appellant 2 took out a Notice of Motion of an application made by him on the same day praying that leave may be granted to him to deposit the whole of the balance of the decretal amount and that the receiver should be restrained from receiving any money from the intending purchaser in terms of the agreement of sale. It appears that on August 22, 1958, respondent 2 tendered a cheque for Rs. 30,000 to the receiver towards the payment of the purchase money under the agreement of sale. Soon, thereafter, however, respondent 2 took back the cheque and paid Rs. 30,000 in cash on September 1, 1958. The application

made by appellant 2 for leave to pay the balance of the decretal amount was dismissed by G. K. Mitter, J., on September 4, 1958. The learned judge, however, stayed the delivery of possession of the property to respondent 2 for a week from the the date of his order.

The appellants then filed an appeal against the order of the learned Judge before a Division Bench of the High Court and obtained an order for stay of delivery pending the decision of the appeal. On April 29, 1959, the Division Bench dismissed the appeal and refused to grant certificate to the appellants to file an appeal in this Court. The appellants then applied for and obtained Special Leave from this Court on May 20, 1959. That is how this appeal has come before us; and the main point which Mr. Sanyal, for the appellants, has raised for our decision is that the Courts below were in error in refusing to give relief to the appellants under Order 21, rule 89 on the ground that the said rule was inapplicable to the sale held by the receiver.

It is common ground that the receiver was appointed with

"power to him to get in and collect the outstanding debts and claims due in respect of the charged property and with all powers provided for in Order 40, rule 1, clause (*d*) of the Code of Civil Procedure."

The order appointing the receiver also expressly directed that the receiver shall be at liberty to sell the said property charged in favour of respondent 1 either by private treaty or by private auction to the best purchaser or purchasers that can be got for the sale but he shall not hold such sale before the 13th day of August, 1956. In other words, the receiver was appointed in execution proceedings under section 51 and was given all the powers under Order 40, rule 1 (*d*) of the Code. It is by virtue of these powers that he entered into the agreement of sale with respondent 2 and sold the property to him and gave him its possession. Section 51 which deals with the powers of the Court to enforce execution provides for the execution of the decree by five alternative modes specified in clauses (*a*) to (*e*). One of the modes of execution is the appointment of a receiver which means that a decree for the payment of money can be executed by the appointment of a receiver. He may either collect the income of the property belonging to the judgment-debtor and thereby satisfy the decree, or if so authorised he may sell the property of the judgment-debtor and thereby arrange for the satisfaction of the decree. Thus, in dealing with the question as to whether the sale held by the receiver is a sale ordered by the Court to which Order 21, rule 89, applies it is necessary to remember that the appointment of the receiver itself is a mode of execution of the decree.

When the receiver so appointed is given all the powers under Order 40, rule 1 (*d*), it is these powers which he seeks to exercise when selling the judgment-debtor's property in execution of the decree. The sale held by the receiver under such conditions would no doubt be governed by the provisions of Order 40, and the Court may supervise or issue directions in respect of such a sale under the provisions of the said order. *Prima facie* the sale held by the receiver appointed in execution proceedings in pursuance of the powers conferred on him under Order 40, rule 1 (*d*) would be governed by the powers conferred on him and the terms and conditions on which the said powers may have been conferred and by other relevant provisions of Order 40. It does not seem to attract the provisions of Order 21.

Courts have had occasion to consider questions about the applicability of several provisions of Order 21 to sales held by receivers and opinions expressed on such questions have differed more particularly in the Calcutta High Court as we will presently indicate. In the present appeal we do not propose to consider or decide the general question about the character of the sale held by the receiver nor do we propose to attempt to specify which provisions of Order 21 will apply to such sales and which will not. We are dealing with the narrow question as to whether Order 21, rule 89, applies to such a sale; and it is to the decision of this narrow question that we will address ourselves in the present appeal.

Order 21, rule 89, enables the persons specified in sub-rule (1) to apply to have the sale held in execution proceedings set aside on two conditions (*a*) the applicant

must deposit for payment to the purchaser a sum equal to 5 per cent., of the purchase money, and (*b*) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale have been received by the decree-holder. The second requirement immediately raises the question as to whether it is necessary for the receiver in selling immoveable property in execution proceedings to issue a proclamation as required by Order 21, rule 66 of the Code. In our opinion there can be no doubt that the provisions of the said rule do not apply to sales held by receivers. No decision has been cited before us where a contrary view has been expressed. The provisions of the said rule apply where property is ordered to be sold by public auction in execution by the Court, and the order for the sale of such property must be made by any Court other than the Court of Small Causes as provided by rule 82. Where the Court appoints a receiver and gives him liberty to sell the property the receiver may either sell the property and thereby realise the money for the satisfaction of the decree, or he may, even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to sell the property if he thought it necessary to do so the Court has ordered the sale of the said property within the meaning of Order 21, rule 82. If the provisions of rule 66 of Order 21 are inapplicable to sales held by receivers it is obvious that the second condition prescribed by rule 89 (1) (*b*) is equally inapplicable and it is undoubtedly one of the two essential conditions for the successful prosecution of an application under the said rule. In our opinion this fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. We are, therefore, satisfied that the High Court was right in refusing to entertain the appellant's application under Order 21, rule 89.

It is then argued that the High Court should have considered the appellants' prayer under section 151 of the Code. It is no doubt a hard case where the appellants have to lose their property though presumably at the time when they made the present application in the High Court they were able to produce for the payment to the decree-holder the whole of the balance of the decretal amount. As the judgment of the Division Bench shows the learned Judges themselves have observed that it was difficult not to feel sympathy for the appellants; but, on the other hand, it is clear from the record that the appellants were given enough opportunity to pay the decretal amount. The decree was passed by consent and included a default clause. The appellants committed default and incurred the liability to pay the whole of the decretal amount. When the agreement of sale executed by the receiver came before the Court another opportunity was given to the appellants to pay the decretal amount on the specified conditions. The appellants again committed a default. It is only later when it was too late that they rushed to the Court with a prayer that they should be allowed to pay the decretal amount themselves and their property should be saved. Under such circumstances, if the learned Judge who heard their application as well as the appellate Court came to the conclusion that the Court's jurisdiction under section 151 cannot be invoked by the appellants, we do not see how we can interfere with the said decision. It is true that section 151 is not specifically mentioned in the judgment of either of the Courts below but that must be obviously because no specific plea under section 151 was raised. Even so the Division Bench has observed that it could not interfere with the order of the learned Judge when in his discretion he refused to make an order as asked for by the appellants. This must inevitably refer to the discretion under section 151, because if Order 21, rule 89, had applied and the appellants had satisfied the conditions prescribed by it there would be no discretion in the Court to refuse such an application. It would then have been right of the appellants to claim that the sale should be set aside. We are, therefore, unable to accede to the plea raised before us by Mr. Sanyal under section 151 of the Code.

There is another point which Mr. Sanyal attempted to raise. He contended that the sale had not been properly confirmed before he moved the Court for leave

to pay the decretal amount, and so the Courts below were in error in not allowing his application. This argument is based on a decision of the Calcutta High Court in *S. M. Sudevi Devi* v. *Sovaram Agariwallah*[1]. In that case Woodroffe J., was dealing with a conditional decree which entitled the decree-holder, on the default of the defendant, to apply to the Court which passed the decree to direct the ejectment of the defendant. It appears that when disputes aroses between the decree-holder and the judgment-debtor in regard to the performance of the conditions imposed by the decree the decree-holder obtained an order for ejectment of the defendant without notice to the judgment-debtor. The judgment-debtor then applied for setting aside, modifying or reviewing the said order. Woodroffe, J., held that a Court had inherent power to deal with an application to set aside an order made *ex parte* on a proper case being substantiated. Mr. Sanyal contends that the sale in the present case being conditional in the sense that it was subject to the confirmation by the Court it was open to the Court to refuse to confirm it when the appellants' applied for leave to pay the balance of the decretal amount. This argument necessarily assumes that the order passed by Mitter J., on May 9, 1958, was a conditional order. In our opinion this assumption is not well-founded. The said order no doubt gave an opportunity to the appellants to pay the decretal amount in the manner prescribed by it but it clearly provided that in default of the appellants complying with the said conditions within the respective due dates the sale of the property by the receiver to respondent 2 be confirmed and that the said receiver do make over possession of the said property to the said purchaser. It is clear that this order is not conditional order at all. It is a composite order. It provided for the payment of the decretal amount by the appellants and in that sense gave an opportunity to the appellants to avoid the sale of their property; but, on the other hand, it also provided that on their default to comply with the order the sale do stand confirmed and the receiver do make over the possession of the property to the purchaser. Therefore, in our opinion, there is no scope for applying the principle laid down by Woodroffe, J., in the case of *S. M. Sudevi Devi*[1].

Before we part with this appeal we may very briefly indicate the nature of the divergence of views expressed in the Calcutta High Court on the question about the character of sales held by receivers appointed by Courts to which our attention has been invited.

In *Minatoonnessa Bibee & Others* v. *Khatoonnessa Bibee and Others*[2], Mr. Justice Sale held that the purchaser at a receiver's sale is entitled to obtain the assistance of the Court in obtaining the possession under the provisions of the Code relating to sales in suits. In coming to this conclusion the learned Judge referred to a precedent in the Calcutta High Court in that behalf, and made an order for possession of the property in favour of the receiver. It may be pointed out that the learned Judge, in dealing with the question, has referred to the important fact that in that particular case the sale had been already treated as a sale by the Court inasmuch as the Registrar had been directed under the provisions of the Code to execute the conveyance on behalf of some of the parties to the suit. Thus the question was in a sense *res judicata*. However, in dealing with the general question the learned Judge has no doubt observed that sales by receivers

> "are in all essential particulars similar to sales by the Registrar, and that if they are sales by a civil Court in a suit the procedure prescribed by the Code for sales in a suit would be applicable".

We do not think that these observations should be divorced from the facts of the particular case with which the learned Judge was dealing, and read as laying down a general proposition that sales held by receivers attract the application of all the provisions in the Code in regard to sales held by the Court. If such a proposition was really intended to be laid down, we would hold that it is not correct at least in regard to the provisions of Order 21, rule 89.

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1. (1906) 10 C.W.N. 306. 2. (1894) I.L.R. 21 Cal. 479.

In *Golam Hossein Cassim Ariff* v. *Fatima Begum*[1], Fletcher, J., has taken a contrary view. He has held that

"a sale by a receiver under the direction of Court is not a sale by Court and in such a sale the Court does not grant a sale certificate nor does it confirm the sale".

The learned Judge referred to the earlier decision of Sale J., and dissented from him. It is unnecessary for us to consider the correctness or otherwise of this decision.

Fletcher, J., adhered to the same view in *Jogemoya Dasee* v. *Akhoy Coomar Das*[2]. In that case the learned Judge was dealing with the sale of prperties by the Commissioner of Partition, and he held that such a sale is not one by the Court but is one made by the Commissioner of Partition under the authority of the Court.

Chaudhuri, J., considered the same question in *Bazir Ali* v. *Hafiz Nazir Ali*[3] and held that in all sales whether by the Court or under the Court or by direction of the Court out of Court the purchaser is bound to satisfy himself of the value, quality and title of the thing sold just as much as if he were purchasing the same under a private contract. According to this decision the sales certificate does not transfer the title. It is evidence of the transfer. Accordingly he directed the receiver to execute a conveyance in favour of the purchaser. This decision is not quite consistent with the view taken by Fletcher, J.

In *Rani Bala Bose and Others* v. *Hirendra Chandra Ghose and Others*[4], Chakravarti, J., as he then was, has incidentally referred to this conflict of judicial opinion in the Calcutta High Court, and has indicated his preference for the view taken by Sale J., though he has been careful enough to add that he was not deciding the point and that the case with which he was concerned was not covered by the actual decision of Fletcher, J.

These decisions show that there has been a divergence of opinion as to the character of the sale held by a Receiver as to whether it is a sale by the Court, or under the Court, or under the directions of the Court. It is because our attention has been invited to these decisions that we have thought it necessary to make it clear that our present decision is confined to the narrow question as to whether the sale held by a receiver attracts the provisions of Order 21, rule 89. We hold that rule 89 of Order 21 does not apply to such a sale and that the High Court was right in rejecting the appellant's claim based on the said rule.

The result is, the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. C. SHAH, JJ.

Ct. A. Ct. Nachiappa Chettiar and others ... *Appellants**

v.

Ct. A. Ct. Subramaniam Chettiar ... *Respondent.*

Arbitration Act (X of 1940), section 21—Scope—Appeal against preliminary decree pending—Trial Court—If can refer disputes to arbitration.

"Court" in section 21 of the Arbitration Act includes the appellate Court, proceedings before which are generally recognised as continuation of the suit, and the word "suit" will include such appellate proceedings. It is open to the trial Court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the Court pronounces its final judgment in the suit. The fact that a preliminary decree has been drawn up and it was based upon a judgment delivered by the Court cannot exclude the application of section 21. That judgment is not a final judgment contemplated by section 21. Where there is an appeal pending

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1. (1910) 16 C.W.N. 394.
2. (1913) I.L.R. 40 Cal. 140.
3. (1916) I.L.R. 43 Cal. 124.
4. (1948) 52 C.W.N. 739.

* Civil Appeals Nos. 112 to 116 of 1955. 13th November, 1959.

against the preliminary decree and proceedings subsequent to preliminary decree are pending before the trial Court it would be open to either the appellate Court or the trial Court to make an order of reference in respect of all the matters in dispute between the parties.

Appeals from the Judgment and Order, dated the 14th December, 1951, of the Madras High Court, in A.A.O. No. 210 of 1946, C.M.Ps. Nos. 3273 and 3274 of 1946, A.A.O. No.661 of 1946, and A.A.O. No. 49 of 1947† respectively, arising out of Judgment and Order, dated the 28th January, 1946, of the Subordinate Judge, Devakotah, in I.A. No. 18 of 1945 in O.S. No. 91 of 1941.

A. V. Viswanatha Sastri, Senior Advocate (*K. Parasaran* and *M. S. K. Aiyangar*, Advocates, with him), for Appellants.

K. Rajah Iyer, Senior Advocate (*R. Rangachari* and *R. Ganapathy Iyer*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—These five appeals arise from a partition suit (O.S. No. 91 of 1941) filed by the respondent Subramanian Chettiar against his brother Ct. A.Ct. Nachiyappa Chettiar and his four sons, appellants 1 to 5 respectively, in the Court of the Subordinate Judge of Devokottai, and they have been brought to this Court with a certificate granted by the High Court of Madras under Article 133 of the Constitution. The principal appeal in this group is Civil Appeal No. 112 of 1955 and the questions which it raises for our decision relate to the validity of the award made by the arbitrators to whom the matters in dispute between the parties were referred pending the present litigation. It would, however, be convenient at the outset to state broadly the material facts leading to the suit and indicate the genesis and nature of the five respective appeals.

The appellants and the respondent belong to the Nattukottai Chettiar community and their family which is affluent had extensive money-lending business in Burma. Chidambaram Chettiar, the father of appellant 1 and the respondent, died on August, 20, 1926. At the time of his death the respondent was an infant, 6 years of age. Appellant 1 had already been associated with his father in the management of the business and on his father's death he became the manager of the family and took charge of its affairs and business. On September 6, 1941, the respondent gave notice to appellant 1 calling upon him to effect a partition and to render accounts of his management and the properties of the family. This demand was not complied with and so the respondent instituted the present suit on September 24, 1941.

According to the plaint the assets of the family consisted of immoveable properties in India which was then described as British India and in Pudukottai, an Indian State. These consisted of Items Nos. 1 to 12 and Item No. 13 respectively in Schedule 'A'. The jewels and moveables belonging to the family were set out in Schedule 'B' whereas two money-lending firms which the family owned and conducted at Minhla and Sitkwin in Burma were set out in Schedules 'D' and 'E' respectively. The plaint further alleged that Chidambaram Chettiar had entered large amounts belonging to the family in the names of the members of the family in what are called Thanathu maral accounts and these amounts were invested in various firms or lent to several individuals. The total of these investments came to about Rs. 15,00,000 described in Schedule 'C'. The assets thus described in Schedules 'C', 'D' and 'E' included immoveable properties in Burma and the respondent claimed a half-share in all of them. It appears that the family had endowed several properties in favour of charities and they were described in Schedule 'F'. The respondent claimed that in effecting partition between the parties a scheme should be framed for the management of the said respective charities. According to the respondent-appellant 1 had in the course of his management manipulated accounts and had in fact misappropriated large amounts, and so he

† (1952) 2 M.L.J. 524.

claimed an account from appellant 1. That in brief is the nature of the claim made by the respondent in his plaint.

At the date of the suit appellants 3 to 5 were minors and they were represented by appellant 1. It appears that a written statement was filed by appellant 1 for himself and as guardian of his minor sons in which the relationship of the respondent and his half share to the family properties were admitted. Several contentions were, however, raised with reference to the properties available for partition. It was alleged that Items Nos. 10 and 11 in Schedule 'A' were dedicated to charity and as such not divisable and that Item No. 3 was being used as a school. The written statement referred to some more properties which had not been included in the plaint though they were liable to partition. In regard to the jewels and moveables it was contended that several items not belonging to the family, and some not even in existence, had been shown in the said schedule. It was also alleged that some of the jewels shown in the said schedule belonged to the several appellants as their separate property. Then as regards the Thanathu maral accounts the appellants gave a detailed history of the amounts and their investments. It was admitted that the said amounts belonged to the family though the investments had been made in the names of the different members of the family. It was, however, urged that the total value of the assets enumerated in Schedule 'C' would be only Rs. 9,00,000 and not Rs.15,00,000 as alleged by the respondent. The respondent's case that appellant 1 had manipulated accounts and misappropriated family funds was denied, and it was urged that for the purpose of partition the assets of the family as they stood on the date of the partition should be taken into account. The appellants also pleaded that the Court had no jurisdiction to divide the immoveable properties situated in Burma. According to them there was a special practice obtaining among the families of the Nattukottai Chettiar community according to which appellant 1 was entitled to a decent remuneration for the management of the joint family business and properties. According to another custom pleaded by the appellants it was alleged that provision had to be made for future Seermurais for the unmarried daughters of the family. Broadly stated these were the pleas raised by appellants 1 and 3 to 5. Appellant 2 who was a major filed a separate written statement generally adopting the written statement filed by appellant 1; nevertheless he put the respondent to the strict proof of the allegations made by him in the plaint in support of his claim.

In reply to the contentions thus raised by the appellants the respondent filed a reply. In this statement he pleaded *inter alia* that there was a custom amongst the community for a member of the joint family to set up a separate family after marriage and that monies drawn by him thereafter would be entered in a separate account called Pathuvazhi and that at the time of the partition the amounts appearing in the said account would be debited to the said member. The respondent claimed that account should be made in accordance with this custom in effecting the partition of the family. On these pleadings the learned trial Judge framed fifteen issues.

It appears that an attempt was made by the parties to have their disputes referred to arbitration, and in fact a reference was made on April 6, 1943, but this attempt proved abortive and the suit was set down for hearing before the Court, and the hearing actually commenced on December 11, 1943. Meanwhile, on December 6, 1943, appellant 2 filed an application under Order 8, rule 9 of the Code of Civil Procedure for permission to file an additional written statement. This application was numbered as I. A. No. 988 of 1943. It would be relevant to refer to the plea which appellant 2 sought to raise by this application. He alleged that the deceased Chidambaram Chettiar had set apart on March 25, 1925, two sums of money of Rs. 2,10,251-4-0 each separately in the name of the respondent and appellant 1 so as to vest the same in them fortwith, and he urged that these amounts and their accretions were not properties of the family liable to partition in the suit. This application was opposed by the respondent. On December 14, 1943, the trial Judge dismissed the said application on the ground that it sought to raise a new and inconsistent plea and that had been really inspired by appellant 1.

Against this decision three appeals were preferred before the High Court of Madras. A.S. No. 115 of 1944 was filed by appellant 2 and No. 199 of 1944 by appellants 1, 3 to 5, whereas A.S. No. 499 of 1944 was filed by the respondent. It appears that under his appeal No. 115 of 1944 appellant 2 made an application for stay of further proceedings before the Commissioner (C.M.P. No. 1402 of 1944). On this petition the High Court ordered that there was no need to stay all proceedings before the Commissioner and that it would be enough if the passing of the final decree alone was stayed. As a result of this order interim stay which had been granted *ex parte* was vacated. After the final order on this application was passed the Commissioner commenced his enquiry, but before the enquiry could make any progress the parties decided to refer their disputes for arbitration.

Accordingly on July 18, 1944, a joint application was field by the parties before the trial Judge requesting him to refer to the arbitration of Mr. VE. RM. AR. Ramanathan Chettiar of Kandanoor and RM. AN. S. RM. Chellappa Chettiar of Kothamangalam "all matters in dispute in the suit and all matters and proceedings connected therewith". An application under Order 32, rule 7, was also filed since three of the parties to the dispute were minors. On July 21, 1944, the trial Court allowed the said application and certified that the proposed reference was for the benefit of the minors and so referred " the matters in dispute in the suit and all matters and proceedings connected therewith " for determination by the two arbitrators named by the parties.

The arbitrators then began their proceedings and made an interim award on August 1, 1944. It was followed by their final award on December 6, 1944. This award was filed in the trial Court.

On January 3, 1945, the appellants filed a petition (I.A. No. 18 of 1945) under sections 30 and 31 of the Indian Arbitration Act (hereinafter called the Act). By this petition the appellants urged that the award should be set aside on the grounds enumerated by them in the petition. Their case was that the reference to arbitration had been brought about by coercion and undue influence, that the arbitrators had not held any proper enquiry and that they were partial and biased. Thus the award was sought to be set aside on the ground that the reference was bad and that the arbitrators were guilty of misconduct. The validity of the award was also challenged on the ground that both the reference and the award were invalid because they contravened the principle of private international law that Courts in one country would have no jurisdiction to adjudicate on title to immoveable property situated in a foreign country or to direct its division; the reference and the award dealt with immoveable properties in Burma and so they were invalid. The appellants further contended that the reference to arbitration was opposed to the orders passed by the High Court in C.M.P. No. 1402 of 1944, and as such it was invalid.

This application was resisted by the respondent. He traversed all the allegations made by the appellants and claimed that a decree in terms of the award should be passed. As the hearing of this petition no oral evidence was led by the parties; they were content to base their case on the documents produced on the record and on points of law raised by them.

The trial Judge rejected the appellants' case about the alleged misconduct of the arbitrators. He also found that there was no substance in the contention that the reference was the result of undue influence or coercion. He was satisfied that the arbitrators had made a proper enquiry and that the award was not open to any objection on the merits. He, however, held that the reference to the arbitrators which included matters in dispute in the suit comprised questions of title in relation to immoveable properties in Burma, and so it was without jurisdiction and invalid. In his opinion the reference also included the dispute relating to the sum of Rs. 2,10,251-4-0 which had been entered in the Thanathu maral accounts of appellant 1 and the respondent and that this part of the reference contravened the order passed by the High Court in C.M.P. No. 1402 of 1944. He

thus upheld these two contentions raised by the appellants and set aside the reference and the award. It was against this order that the respondent preferred C.M.A. No. 210 of 1946.

The High Court has allowed the respondent's appeal. It has confirmed the findings of the trial Court in respect of the pleas raised by the appellants as to the misconduct of the arbitrators and as to the invalidity of the reference on the ground that it was the result of coercion and undue influence. It has, however, reversed the conclusion of the trial Court that the reference and the award were invalid nasmuch as they related to immoveable properties in Burma and contravened the stay order passed by the High Court. The High Court has construed the order by which reference was made to the arbitrators in the present proceedings as well as the award and has held that they are not open to be challenged on either of the two grounds urged by the appellants. It was also urged before the High Court that the order of reference was invalid because under section 21 of the Act the trial Court was not competent to make the reference; this contention has been negatived by the High Court. In the result the High Court has found that the reference and the award were valid and it has directed that a decree should be passed in terms of the award. It is against this decision that Civil Appeal No. 112 of 1955 arises; and, as we have already mentioned, the questions which it raises relate to the validity of the award on which the two Courts have differed. Before we deal with the merits of these points, however, we may indicate how the other appeals arise.

In A.S. No. 115 of 1944 filed by appellant 2 before the High Court the appellant presented Miscellaneous Application C.M.P. No. 2374 of 1946 under Order 23, rule 3 for an order that the interim award (Exhibit P. 15) passed by the arbitrators which had been signed by all the parties in token of their consent should be treated as a compromise and a decree passed in accordance with it under Order 23, rule 4. The High Court has observed that in view of its decision in C.M.A. No. 210 of 1946 it was really unnecessary to pass any order in this appeal; but it thought that since the matter was likely to go in appeal to this Court it would be better to make a formal order and direct that a decree in terms of the interim award should be drawn under Order 23, rule 3. Against this decision the appellants have preferred Civil Appeal No. 116 of 1955 in this Court.

The appellants had made a similar application in A.S. No. 199 of 1944 and it was numbered as C.M.P. No. 3273 of 1946. The High Court has allowed this application for similar reasons and its decision has given rise to Civil Appeal No. 115 of 1955.

In the trial Court the appellants had filed two similar applications under Order 23, rule 3; but they had been rejected by the trial Court; these orders had given rise to two appeals in the High Court, C.M.A. No. 661 of 1946 and C.M.A. No. 49 of 1947. The High Court has allowed these appeals and has ordered that a decree in terms of compromise should be passed under Order 23, rule 3. Against the orders thus passed by the High Court in these two appeals Civil Appeals Nos. 113 and 114 of 1955 have been filed in this Court. That is the genesis and nature of the four subsidiary appeals in the group. We will now revert to the points which arise for our decision in the principal Civil Appeal No. 112 of 1955.

The first ground on which the validity of the reference and the award is challenged is based on the assumption that the reference involved the determination of the title to immoveable properties situated in Burma and/or that the award has actually determined the said question of title. The appellants contend that there can be no doubt that Courts in this country have no jurisdiction to determine questions of title in respect of immoveable properties in foreign countries or to direct a division thereof. This position is not and cannot be disputed. The rule of law on this subject has been thus stated by Dicey: "The Courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country"[1]. It is also urged that where a

1. Dicey's "Conflict of Laws", 6th Ed., pages 141 and 348.

Court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immoveable property it has no jurisdiction to refer it for the determination of the arbitrators. This position also is not and cannot be disputed. The appellants further argued that if the reference includes properties over which the Court had jurisdiction as well as those over which it had no jurisdiction the whole of the reference becomes invalid and in such a case it is not permissible to separate the invalid part of the reference from that which is valid. The correctness of this contention is disputed by the respondent; but, for the purpose of the present appeal the respondent is prepared to argue on the assumption that even this contention is well-founded. The respondent's case is that neither the reference nor the award purports to deal with any immoveable property in Burma; and so the challenge to the validity of the reference and the award on the legal points raised by the appellants cannot succeed. It is, therefore, necessary to examine the reference and the award and decide whether the factual assumption made by the appellants in urging their legal grounds against the validity of both the reference and the award is justified.

It dealing with this question it is necessary first to ascertain the scope of the request made by the parties when they applied to the trial Court for reference of their dispute to arbitration. In their application (Exhibit P. 12) the parties have briefly indicated the nature of the respondent's claim and have stated that the dispute between the parties was then pending before the High Court in the form of three appeals preferred by them. Then it is averred that appellants 3 to 5 are minors but it is added that the proposed reference was for their benefit and so another application had been separately made for the Court's sanction to the said reference in respect of the said minors. "The parties desire and agree", said the application, "that all matters in dispute in this suit and all matters and proceedings connected therewith should be referred to the unanimous decision of the two named arbitrators." They had also agreed that they would abide by the unanimous decision of the arbitrators and that the arbitrators should be empowered to partition the properties of the joint family between the parties and if necessary also by payment of monies to equalise the shares and to take the necessary accounts and to decide all matters in dispute between them including costs. The parties had further agreed to produce their own papers and copies before the arbitrators and that if the arbitrators needed any further papers, accounts or documents which had been filed in Court they should be authorised to require the Commissioner to send them to the arbitrators. It is on this application that the Court made the order that "all matters in dispute in this suit and all matters and proceedings connected therewith" be referred for determination to the two named arbitrators. The question which arises for our decision is: What was the scope and extent of the matters thus referred to arbitration? In other words, did this order of reference include the respondent's claim for a share in the immoveable properties in Burma?

The appellants contend that the order of reference includes not only all matters in dispute in the suit but also all matters and proceedings connected therewith and their case is that these clauses are wide enough to include the respondent's claim for a share in the immoveable properties in Burma. There is no doubt that the latter clause refers to matters and proceedings connected with the suit; but the appellants' contention can be upheld only if it is shown that the respondent's claim for a share in the properties in Burma was connected with the suit or was a part of the matters connected with it at the material time.

What then was the nature and extent of the dispute between the parties at the material time? Let us examine the pleadings of the parties, the issues framed by the trial Court, the decision of the trial Court on them and ascertain the nature and extent of the subsisting dispute between them which was pending in the High Court in the three respective appeals. There is no doubt that in his plaint the respondent had claimed a share in the immoveable properties in Burma. In regard to this claim his allegation was that with the aid of the advances made by the

family firms in Burma and of those in the accounts described as Thanathu maral accounts, lands and other properties had been purchased and they formed part of the assets of the firms and the Thanathu maral accounts. The written statement filed by appellant 1 admitted that there were Thanathu maral transactions during the lifetime of Chidambaram Chettiar and that all sums taken from the family assets, though invested for the sake of convenience in the name of one or the other member of the family, belonged to the family and had been treated as family assets. According to the appellants, however, the extent of the Thanathu maral transactions had been exaggerated by the respondent. On the whole the written statement clearly admitted that the branches of appellants 1 to 5 on the one hand and of the respondent and his son on the other are entitled to a half-share each; but they pleaded that the said shares have to be allotted only after making some provisions out of the joint family funds for the payments of the future Seerumurai etc., due to the unmarried daughters in the family. They also contended that the Court had no jurisdiction to divide the immoveable properties in Burma though it was admitted that the respondent was entitled to the relief in respect of the division of the family assets as set forth in the written statement. This written statement was adopted by appellant 2 though in a general way he denied the allegations in the plaint which had not been expressly admitted by him in his written statement. It would thus be seen that the respondent's share in the family properties was not in dispute nor was his share in the properties in Burma seriously challenged. The only pleas raised in respect of the latter claim was that the Court had no jurisdiction to deal with it. This state of the pleadings in a sense truly reflected the nature of the dispute between the parties. It is common ground that the family is a trading family and there could be no doubt that the assets of the family were partible between the members of the family. It was on these pleadings that the trial Judge framed fifteen issues and set down the case for hearing.

At this stage appellant 2 wanted to go back upon his written statement by making further and additional pleas. That is why he filed an application (Exhibit P-3 (*a*)) for leave to file an additional written statement. As we have already mentioned this application was rejected by the trial Court; but for our present purpose it is relevant to consider the pleas which he wanted to raise by this additional statement. He wanted to contend that the amounts set apart in favour of appellant 1 and the respondent respectively by their father remained invested distinctly and separately during his lifetime and that in law they ought to be taken to be separate properties belonging to the two respective branches. In other words, the plea thus sought to be raised was that by reason of the investment of the amounts in the names of appellant 1 and the respondent respectively the said amounts constituted the individual and separate monies of the respective persons and became the separate properties of their branches. Appellant 2 thus raised a contention about the character of the amounts invested by the deceased Chidambaram Chettiar in the two names of his sons respectively and in that sense the issue which he sought to raise was in regard to the character of the amounts themselves. It had no direct reference to any immoveable properties in Burma.

Since the trial Court refused to allow appellant 2 to raise this additional plea he proceeded to try the issues already framed by him, and, as we have already indicated, he held that he had no jurisdiction to deal with immoveable properties in Burma and appointed a Commissioner to make an enquiry in pursuance of the preliminary decree. The preliminary decree in terms excluded from its operation the immoveable properties in Burma as well as in the Indian State of Pudukottai. In the proceedings before the Commissioner parties agreed that the properties in Burma and Pudukottai should be left out of account and so no dispute appears to have been raised before him that the accounts of the firms in Burma should be taken by him.

In the appeal filed by the respondent against this preliminary decree he did not challenge the decision of the trial Court that he had no jurisdiction to deal with

immoveable properties out of British India. His appeal raised some other points which it is unnecessary to mention. This fact is very significant. It shows that the respondent accepted the finding of the trial Court and did not want the High Court to consider his claim for a share in the excluded properties. In the appeal preferred by appellant 2 he had urged *inter alia* that the trial Court should have allowed him to raise the additional pleas and it appears that he had also raised a point that the trial Court had no jurisdiction to direct a division of the immoveable properties of the firms in Burma. The grounds taken by appellant 2 in his memo. leave no manner of doubt that none of the pleas which he sought to raise before the High Court had any reference to immoveable properties in Burma. It is, therefore, clear that in none of the three appeals pending before the High Court was it urged by any party that the immoveable properties in Burma should be brought within the scope of the partition suit.

The application made by the parties for arbitration to which we have already referred has deliberately set out the pendency of the three appeals in the High Court at the material time in order to furnish the background for determining the extent and nature of the dispute which was sought to be referred to arbitration. The respondent's claim for a share in the properties outside India had been negatived by the trial Court and the decision of the trial Court had become final because it was not challenged by the respondent and so there can be no doubt that the said claim was outside the purview of the dispute which was then pending between the parties in the High Court. It was not, and could not have been, intended to be a matter in dispute in the suit between the parties or any matter and proceedings connected therewith. Therefore we are satisfied that the High Court was right in coming to the conclusion that the reference did not include any claim with regard to the immoveable properties in Burma.

It is, however, urged that the reference did include the points raised by appellant 2 in his appeal before the High Court; and that no doubt is true. But what is the effect of the said grounds raised by appellant 2? As we have already pointed out the said grounds did not raise any question about immoveable properties in Burma. They merely raised a dispute about the character of amounts invested bythe deceased Chidambaram Chettiar in the names of appellant 1 and the respondent respectively. It was a dispute in regard to monies or moveables and so appellant 2 was driven to contend that the trial Court had no jurisdiction to deal with such moveables. This contention is obviously without substance and has not been raised either in the Courts below or before us. The only argument raised is that the reference included claims in regard to immoveable properties in Burma and this argument cannot be supported on the ground of the pendency of the appeal by appellant 2 before the High Court because, even if the said appeal was allowed, it could have no reference to any immoveable properties in Burma. Thus the attack against the reference on the ground that it included immoveable properties in Burma must fail.

Does the award deal with the said immoveable properties in Burma? That is the next question which falls to be considered. If it does, it would be invalid not only because it purports to deal with foreign immoveable properties but also for the additional reason that it is in excess of the terms of reference. At the hearing of the present appeals in this Court Mr. Viswanatha Sastri, for the appellants, attempted to criticise the decision of the arbitrators on several grounds; but we did not allow him to raise any contentions against the merits of the award because both the Courts below have rejected the appellant's objections in that behalf, and in view of their concurrent findings it would not be open to the appellants to raise the same points over again. That is why we would confine ourselves to those portions of the award which, according to the appellants, show that the arbitrators divided the immoveable properties in Burma and Pudukottai.

In regard to the properties in Pudukottai this is what the award says in paragraph 3 :

"The plaintiff and the defendants shall enjoy them in equal halves as under marukkal kuttu. In proportion to their respective shares, the plaintiff shall pay one-half of the taxes and the defendants 1 to 5 the other half. Since the aforesaid property has been situate in Pudukottai State it has not been divided on the good and bad qualities of the soil; if it is necessary, the plaintiff and the defendants shall have it devided in equal halves, later on when required".

In regard to the properties in Burma, paragraph 1 of the award recites that

"after communications are resorted in Burma the plaintiff and the defendants have to divide the firms in Burma at the places Minhla and Sitkwin belonging to them and the lands, godowns, homes, gardens and the properties items, bank deposits, jewels, moveables, all assets, etc., and the subsequent income attached thereto into two halves, and the plaintiff has to take one half and the defendants the other half".

Paragraph 2 adds that since both the parties have agreed to divide the moveable properties attached to the said shop later on the arbitrators had not divided them. The award has also stated that the sale deeds at Alagapuri and relating to the lands attached to the said firms have been divided into two lots and for the purpose of safe custody two lists, known as Schedules A and B have been prepared and both parties have signed the lists. Later on, at the time of division of the said lands, firms and assets, all the documents shall be collected together and the parties shall take the documents relating to their respective shares.

The arbitrators then dealt with the additional plea sought to be raised by appellant 2, and in substance they refused appellant 2 permission to raise that plea because they thought that having regard to the conduct of the parties it was futile to raise such a plea. That is why they directed that

"the plaintiff's branch and the defendant's branch have shares in all the amounts and they added that their conduct fully justified the said conclusion and the parties agreed to it".

It is these portions of the award on which the appellants based their contention that immoveable properties in Pudukottai and Burma have been dealt with by the arbitrators. In our opinion this contention is not well-founded. What the arbitrators have done is to divide the properties which were then the subject-matter of the dispute between the parties; and having done so they have indicated what the legal position of the parties would be in respect of the properties outside the dispute. In appreciating the effect of the words used in the award we must bear in mind that the arbitrators were laymen not familiar with the technical significance of legal expressions, and so we must read the relevant clauses as a whole with a view to determine what in effect and substance they intended to decide. Now take the recitals in the award to the Pudukottai properties. The award expressly states that the properties had not been divided by them and that the plaintiff and the defendants shall have them divided when so required. All that the award says is that since the parties had separated and the properties in suit before the arbitrators had been actually divided by metes and bounds, the two branches shall enjoy the Pudukottai properties in equal halves. This clause in the award cannot be said to divide the said properties or even to determine their shares in them. The shares of the parties in the said properties were admitted and so the award merely says that as divided members they will hold and enjoy the properties half and half.

Similarly in regard to the properties in Burma the award expressly states that the said properties had not been divided and it merely refers to the true legal position that they would be enjoyed by the two branches half and half. The arrangement proposed by the arbitrators in respect of the immoveable properties in Burma is very significant. They merely asked the parties to hold the documents of title half and half for safe custody and they have added that when the parties decided to divide the properties all the documents would have to be brought together and a partition made according to law. That again is an arrangement dictated by commonsense and cannot be said to amount to a decision in any way. It is not as if the award declares the shares of the parties in respect of the properties. What it does is no more than to state the true and admitted legal position of the parties, rights in respect of the said properties.

In this connection it would be useful to refer to the observations made by Viscount Dunedin in *Bageshwari Charan Singh* v. *Jagarnath Kuari*[1]. In that case the Privy Council was called upon to consider the question about the admissibility of a petition which was relied upon as an acknowledgment of liability under section 19, sub-section (1) of the Limitation Act; and it was urged that the said petition was inadmissible because it purported or operated to create or declare a right to immoveable property and as such was compulsorily registrable under section 17 (1) (*b*) of the Registration Act, 1908. In urging the objection to the admissibility of the petition a large number of Indian decisions were cited before the Privy Council dealing with the word "declare" used in section 17 (1) (*b*) of the Registration Act, 1908; and it was apparent that there was a sharp conflict of views. In *Sakha Ram Krishnaji* v. *Madan Krishnaji*[2], West, J., had observed that the word "declare" in section 17 (1) (*b*) is placed along with 'create', 'assign' 'limit', or 'extinguish' a right, title or interest and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to, and had added that he thought that is equally the case with the word "declare". On the other hand, certain other decisions had construed the word "declare" liberally in a very wide sense and it was on those decisions that the objection against admissibility of the petition was founded. In repelling the objection Lord Dunedin observed that

> "though the word 'declare' might be given a wider meaning they are satisfied that the view originally taken by West, J., is right. The distinction is between a mere recital of fact and something which in itself creates a title".

These observations assist us in deciding the question as to whether the impugned portions of the award declare, the parties' rights in immoveable properties in the sense of deciding them as points or matters referred to arbitration. In our opinion, the High Court was right in answering this question against the appellants. Therefore the award is not open to the attack that it deals with immoveable properties out of the jurisdiction of the Court.

That takes us to the next ground of attack against the validity of the award. It is urged that the award contravenes the order passed by the High Court on the stay petition filed before it by appellant 2. There is, however, no substance in this contention. All that the High Court directed was that pending the final decision of the appeals before it a final decree should not be drawn. In fact the High Court clearly observed that there was no reason for staying all the proceedings pending before the Commissioner. That is the usual order made in such cases, and it is difficult to appreciate how this order has been contravened by reference to arbitration or by that award that followed it. The award is not and does not purport to be a final decree in the proceedings and the proceedings before the arbitrators substantially correspond to the proceedings of the enquiry which the Commissioner would have held even under the order of the High Court. Therefore this contention must also fail.

We must now consider another objection against the validity of the reference which has been seriously pressed before us. It is urged that the reference and the award are invalid because the trial Court was not competent to make the order of reference under section 21 of the Act. Section 21 reads thus:

> "Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

Two conditions must be satisfied before an application in writing for reference is made. All the interested parties to the suit must agree to obtain a reference and the subject-matter of the reference must be any matter in difference between the parties in the suit. When these two conditions are satisfied the application for re-

1. (1932) I.L.R. 11 Pat. 272 : L.R. 53 I.A. 130 : 62 M.L.J. 296 (P.C.).
2. (1881) I.L.R. 5 Bom. 232.

ference must be made at any time before the judgment is pronounced. Thus broadly stated the construction of the section presents no difficulty. But when we analyse the implications of the two conditions and seek to determine the denotation of the word "Court", difficulties arise. What does the word "Court" mean in this section? According to the appellants "Court" means the Court as defined by section 2 (*c*) of the Act. Section 2 (*c*) defines the "Court" *inter alia* as

> "a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit";

and this *prima facie* means the trial Court. The argument is that an order of reference can be made only by the trial Court and not by the appellate Court, and so there can be no reference after the suit is decided and a decree has been drawn up in accordance with the judgment of the trial Court. In the present case a judgment had been delivered by the trial Court and a preliminary decree had been drawn in accordance with it, and so there was no scope for making any order of reference. That is the first part of the argument which must be carefully examined.

Does the "Court" in the context mean the trial Court? This construction cannot be easily reconciled with one of the conditions prescribed by the section. After a decree is drawn up in the trial Court and an appeal is presented against it, proceedings in appeal are a continuation of the suit; and speaking generally, as prescribed by section 107 of the Code of Civil Procedure the appellate Court has all the powers of the trial Court and can perform as nearly as may be the same duties as are conferred and imposed on the trial Court. If that be so, during the pendency of the appeal, can it not be said that matters in difference between the parties in suit continue to be matters in dispute in appeal? The decision of the appeal can materially affect the nature and effect of the decree under appeal; and there is no doubt that all the points raised for the decision of the appellate Court can be and often are points in difference between them in the suit; and, in that sense, despite the decision of the trial Court the same points of difference in suit continue between the parties before the appellate Court. If during the pendency of such an appeal parties interested agree that any matter in difference between them in the appeal should be referred to arbitration the first two conditions of the section are satisfied. When section 21 was enacted did Legislature intend that during the pendency of the appeal no reference should be made even if the parties satisfied the first two conditions prescribed by the section?

In considering this question it would be relevant and material to take notice of the fact that prior to the passing of the Act in 1940 the longstanding practice of Indian Courts was to refer to arbitration disputes pending before the appellate Court between the respective parties to the appeals. If the object of enacting section 21 was to prohibit such reference at the appellate stage it would, as the High Court has observed, cause 'a revolution in the existing practice'. Was such a revolution really intended? Having regard to the fact that the words used in section 21 are substantially the same as those used in Schedule II, paragraph 1, of the earlier Code, it would be difficult to sustain the plea that the enactment of section 21 was intended to bring about such a violent departure from the existing practice. If that had been the intention of the Legislature it would have made appropriate changes in the words used in section 21. Therefore the word "Court" cannot be interpreted to mean only the trial Ccurt as contended by the appellants. Similarly the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. In our opinion "Court" in section 21 includes the appellate Court, proceedings before which are generally recognised as continuation of the suit; and the word "suit" will include such appellate proceedings. We may add that whereas section 41 of the Act is consistent with this view no other section militates against it.

The next question is: When can an application for reference be made? The section prescribes that it can be made at any time before the judgment is pronounced. It has been fairly conceded before us that the word "judgment"

cannot refer to the various interlocutory orders and judgments that may be passed during the hearing of the suit; and so the word "judgment" cannot be given the meaning assigned to it by section 2 (9) of the Code. It cannot mean in the context, the statement given by the Judge of the grounds of a decree or order. It must mean a judgment which finally decides all matters in controversy in the suit. Thus it follows that it is open to the parties to apply for a reference at any time before the final judgment is pronounced in the suit. If that be so, can the parties apply for an order referring matters in difference between them even though such matters may have been covered by interlocutory judgments delivered in the meanwhile? The appellants suggest that though reference to arbitration may be made at any time before the final judgment is pronounced the subject-matter of the reference must be such as is not covered by any decision of the Court pronounced in the meanwhile. This argument reads the word "judgment", as judgment in regard to a matter in difference between the parties; if a difference between the parties has been covered by an interlocutory judgment it can no longer be referred to arbitration; that is the the contention. We are not impressed by this contention. In our opinion, the scheme of the section does not permit the addition of any words qualifying the word "judgment" used in it. The expression "at any time before the judgment is pronounced" is only intended to show the limit of time beyond which no reference can be made, and that limit is reached when a final judgment is pronounced. The provision that "any matter in difference between the parties in the suit can be referred to arbitration" cannot be subjected to the further limitation that the said matter can be referred to arbitration if it is not covered by the judgment of the Court. The effect of the section appears to be that so long as the final judgment is not pronounced by the Court any matter—*i.e.*, some or all the matters—in difference between the parties can be referred to arbitration provided they are agreed about it. If a reference can be made even at the appellate stage when all matters in difference between the parties are covered byt he final judgment of the trial Court, it is difficult to understand why in allowing reference to be made during the pendency of the suit in the trial Court any further condition should be imposed that only such matters of difference can be referred to as are not covered by an interlocutory judgment of the Court. We would accordingly hold that it is open to the trial Court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the Court pronounces its final judgment in the suit.

But this construction still leaves one question to be considered. Had a final judgment been pronounced by the trial Court in this case at the time when it passed the order of reference? It had delivered a judgment and a preliminary decree had been drawn up. A judgment delivered by a Court in a partition suit which is followed by a preliminary decree cannot be said to be a final judgment in the suit. Proceedings which parties may take pursuant to the preliminary decree are till a part of the suit, and it is only with the passing of the final decree that the suits comes to an end. As observed by the Privy Council in *Jadu Nath Roy and Others* v. *Parameswar Mullick and others*,[1] a partition suit in which a preliminary decree has been passed is still a pending suit with the result that the rights of parties who are added after the preliminary decree have to be adjusted at the time of the final decree. This position is not disputed. Therefore the fact that a preliminary decree had been drawn up in the present case and it was based upon a judgment delivered by the Court cannot exclude the application of section 21. The judgment which had been delivered by the Court is not a final judgment contemplated by section 21. The trial Court would, therefore, have jurisdiction to make the order of reference.

There is, however, another fact which introduces a complication; and that is the pendency of the three appeals before the High Court at the material time. As we have already observed the three appeals which were pending before the High Court raised before that Court matters in difference between the parties in the suit,

1. (1939-40) L.R. 67 I.A. 11 : (1940) 1 M.L.J. 97.

and to that extent the said matters of difference were really pending before the High Court and not before the trial Court. In such a case, which is the Court that has jurisdiction to make the order of reference? There is no difficulty in holding that if the suit is pending in the trial Court and a final judgment has not been pronounced by it, it is the trial Court which is competent to make the order of reference. Similarly, if a suit has been decided, a final judgment has been delivered and a decree had been drawn up by the trial Court and no appeal has been preferred against it, the matter is concluded and there is no scope for applying section 21 at all. On the other hand, if a decree determining the suit has been drawn up by the trial Court and it is taken to the appellate Court, during the pendency of the appeal, it is the appellate Court that is competent to act under section 21. These three cases do not present any difficulty; but where a preliminary decree has been drawn up and an appeal has been filed against it the complication arises by reason of the fact that the disputes between the parties are legally pending before two Courts. Proceedings which would have to be taken between the parties in pursuance of, and consequent upon, the preliminary decree are pending before the trial Court; whereas matters in difference between the parties which are covered by the preliminary judgment and decree are pending before the appellate Court. In such a case it may perhaps be logically possible to take the view that the arbitration in respect of the disputes in relation to proceedings subsequent to the preliminary decree can be directed by the trial Court, whereas arbitration in respect of all the matters concluded by the trial Court's preliminary judgment which are pending before the appellate Court can be made by the appellate Court; but such a logical approach is not wholly consistent with section 21; and rather than help to solve any difficulty it may in practice create unnecessary complications. In most cases matters in dispute before the trial Court in final decree proceedings are so inextricably connected with the matters in dispute in appeal that effective arbitration can be ordered only by one reference and not by two. We are, therefore, inclined to hold that in a case of this kind where both the Courts are possessed of the matters in dispute in part it would be open to either Court to make an order of reference in respect of all the matters in dispute between the parties. It is argued that on such a construction conflict of decisions may arise if two sets of arbitrators may be appointed. We do not think that such a conflict is likely to occur. If the parties move the trial Court and obtain an order of reference they would inevitably ask for appropriate orders of withdrawal or stay of the appellate proceedings, if, on the other hand, they obtain a similar order of reference from the appellate Court they would for similar reasons apply for stay of the proceedings before the trial Court. In the present case proceedings subsequent to the preliminary decree were pending before the trial Court and so we must hold that the trial Court was competent to act under section 21. On that view the objection against the validity of the reference based on the provisions of section 21 cannot succeed.

We may now briefly refer to some of the decisions to which our attention was invited. Before the Act was passed in 1940 the procedure for referring matters in dispute between the parties in pending suits was governed by the provisions of Schedule II to the Code of Civil Procedure. There appears to have been a consensus of judicial opinion in favour of the view that under Schedule II, paragraph 1, the appellate Court could make an order of reference in respect of matters in dispute between the parties in an appeal pending before it. A note of dissent had, however, been struck by a Full Bench of the Calcutta High Court in *Jugesseur Dey* v. *Kritartho Moyee Dossee*[1]. In that case the question for decision arose under the provisions of the Code of 1859 and the Full Bench held that an appellate Court had no power even by consent of parties to refer a case for arbitration under the arbitration sections of Act VIII of 1859 which applied only to Courts of original jurisdiction nor was such power conferred on an appellate Court by section 37 of Act XXIII of 1861. One of the reasons which weighed with Couch, C.J., who delivered the principal

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1. 12 Beng.L.R. 266 (F.B.).

judgment of the Full Bench was that according to him neither reason nor convenience required that the appellate Court should refer a suit to arbitration after the matter had been decided by the trial Court. Kemp, J., who concurred with the decision, apprehended that

"if the parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice such a proceeding might tend to bring lower Courts into contempt."

In our opinion this apprehension is not well-founded. Besides it is well-known that when parties agree to refer the matters in dispute between them in suit to arbitration they desire that their disputes should be disposed of untrammelled by the rigid technicalities of the Court procedure. A search for a short-cut by means of such arbitration sometimes takes the parties on a very long route of litigation but that is another matter.

The Calcutta view was dissented from by the Madras High Court in *Sangaralingam Pillai*[1], in somewhat emphatic words.

" Entertaining all respect for the opinions of the learned Judges of the High Court of Calcutta by whom the case of *Jugesseur Dey*[2], was decided",

observed the judgment,

"we are not convinced by the reason given in the judgment for holding that an appellate Court might not, with consent of the parties, refer the matters in dispute in the appeal to arbitration."

Having thus expressed their disapproval of the Calcutta view, the learned Judges proceeded to add that in the case before them an order of reference was sought for under section 582 of the Code of 1877 and they held that under the said provision the appellate Court is given the same powers and is required to perform the same functions as nearly as may be as the trial Court. The view thus expressed by the Madras High Court was subsequently accepted and approved by the Calcutta High Court in *Bhugwan Das Marwari and another* v. *Nund Lall Sein and another*[3], and *Suresh Chunder Banerjee* v. *Ambica Churn Mookerjee*[4]. As we have already observed, prior to the enactment of the Act there has been a longstanding judicial practice under which orders of reference have been passed by appellate Courts in respect of matters in dispute between the parties in appeals pending before them.

The construction of section 21 has led to a divergence of judicial opinion. In *Abani Bhusan Chakravarty and others* v. *Hem Chandra Chakravarty and others*[5], the Calcutta High Court has taken the view that the Court as defined in the Abritration Act does not include an appellate Court and consequently there is nothing in the Act which enables an appellate Court to refer to arbitration matters in dispute between the parties. This decision proceeds on the erroneous view that the "Court" in section 21 means only the Court as defined in section 2 (*c*) and that the considerations based on the powers of the appellate Court prescribed by section 107 are foreign to the Act. It also appears that the learned Judges were disposed to think that if the matter in dispute between the parties at the appellate stage was referred to arbitration it might tend to bring the lower Courts into contempt. There is no doubt that a Court cannot claim an inherent right to refer a matter in dispute between the parties to arbitration. Before a matter can be thus referred to arbitration it must be shown that the Court in question has been statutorily clothed with the power to make such an order; and that would depend on the construction of section 21 of the Act. The Calcutta High Court has construed the said section in substance consistently with the view taken by it in the case of *Jugesseur Dey*[2].

On the other hand the Patna High Court has taken a contrary view in *Thakur Prasad* v. *Baleshwar Ahir and others*[6]. Jamuar, J., who delivered the judgment of the Court, has considered the decision of the Calcutta High Court in the case of *Jugesseur Dey*[2], and has dissented from it. In the Allahabad High Court somewhat conflicting

1. (1881) I.L.R. 3 Mad. 78.
2. 12 Beng. L.R. 266.
3. (1886) I.L.R. 12 Cal. 173.
4. (1891) I.L.R. 18 Cal. 507.
5. A.I.R. 1947 Cal. 93.
6. A.I.R. 1954 Pat. 106.

views had been expressed on different occasions ; but, on the question as to whether the appellate Court can refer a matter in dispute between the parties to arbitration or not, and whether the suit includes an appeal, the decision of the Full Bench of the Allahabad High Court in *Moradhwaj* v. *Bhudar Das*[1], seems to be on the same lines as that of the Patna High Court. This Full Bench also considered the question about the applicability of section 21 to execution proceedings but with that aspect of the matter we are not concerned in the present appeal. The Madras High Court has taken the same view in *Subramannaya Bhatta* v. *Devadas Nayak and others*[2]. However, none of these decisions had occasion to consider the question about the competence of both the trial Court and the appellate Court in cases where a preliminary decree has been passed and an appeal has been filed against the said decree. It would thus appear that the majority of the Indian High Courts have construed the words "suit" and "Court" used in section 21 liberally as including appellate proceedings and the appellate Court respectively. In the result we hold that the trial Court was competent to make the reference and its validity is not open to any objection.

That leaves only one point to be considered. It is urged by the appellants that the arbitrators acted illegally and without jurisdiction in directing the appellants to pay to the respondent Rs. 2,682-6-0 by way of interest on the amounts specified in the award up to December 5, 1944, and from that date at the rate of 5 as. per cent. per mensem, thus imposing on the appellants a total liability of Rs. 2,36,782-11-9. The appellants have also been directed to pay future interest on the same amount at 8 as. per cent. per mensem from the said date until the date of payment. This argument is based solely on the observations made by Bose, J., who delivered the judgment of this Court, in *Seth Thawardas Pherumal* v. *The Union of India*[3]. It appears that in that case the claim awarded by the arbitrators was a claim for an unliquidated sum to which Interest Act of 1839 applied as interest was otherwise not payable by law in that kind of case. Dealing with the contention that the arbitrators could not have awarded interest in such a case Bose, J., set out four conditions which must be satisfied before interest can be awarded under the Interest Act, and observed that none of them was present in the case ; and so he concluded that the abritrator had no power to allow interest simply because he thought that the payment was reasonable. The alternative argument urged before this Court that interest could be awarded under section 34 of the Code of Civil Procedure, 1908, was also repelled on the ground that the arbitrator is not a Court within the meaning of the Code nor does the Code apply to arbitrators. Mr. Viswanatha Sastri relies upon these observations and contends that in no case can the arbitrators award interest. It is open to doubt whether the observations on which Mr. Viswanatha Sastri relies support or were intended to lay down such a broad and unqualified proposition. However we do not propose to pursue this matter any further because the present contention was not urged before the High Court. It was no doubt taken as a ground of appeal but from the judgment it is clear that it was not urged at the time of hearing. Under these circumstances we do not think we would be justified in allowing this point to be raised before us.

The result is that the conclusion reached by the High Court is right and so its order that a decree should be drawn in terms of the award must be confirmed. Civil Appeal No. 112 of 1955 accordingly fails and is dismissed with costs. It is conceded that if the principal appeal fails it would not be necessary to make any effective orders on the rest of the appeals in this group. The said appeals also fail and are dismissed ; but there would be no order as to costs.

Appeals dismissed.

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1. A.I.R. 1955 All. 353.
2. (1955) 2 M.L.J. 625: A.I.R. 1955 Mad. 693.
3. (1955) S.C.J. 445 : (1955) 2 M.L.J. (S.C.) 23: (1955) 2 S.C.R. 48.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT: B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. C. GUPTA AND J. C. SHAH, JJ.

S. Kapur Singh .. *Appellant**

v.

The Union of India .. *Respondent.*

Public Servants (Inquiries) Act (XXXVII of 1850)—*Applicability to case of member of All India Civil Service—Order of dismissal—Prerequisites—Civil Services (Classification, Control and Appeal) Rules, rule* 55 —*Applicability—Constitution of India* (1950), *Article* 311—*Scope.*

The Public Servants (Inquiries) Act, 1850, seeks to regulate enquiries into the behaviour of superior public servants who are not removable from their appointment without the sanction of the Government; enquiries into the behaviour of members of subordinate services, who are appointed and are liable to be dismissed by authorities subordinate to the Government being excluded from the purview of the Act. There is no foundation for the submission that members of the Indian Civil Service, because they hold office during the pleasure of the President since the commencement of the Constitution, are employees of the President. They are and continue to remain employees of the Union or the State under which they are employed. By the Constitution, the executive power of the Union is conferred upon the President, and it is in exercise of that executive power that the President may dismiss a member of the Civil Service of the Union or of an all India service from his appointment.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules in express terms states that the enquiry contemplated therein is " without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850 ". That rule does not support the submission that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal or removal or reduction is passed against a member of the Civil Service, another enquiry expressly directed under rule 55 shall be made.

A member of the Indian Civil Service, before disciplinary action is taken against him is therefore entitled by the force of the guarantees enshrined in the Constitution to an enquiry into his alleged misdemeanour either under the Public Servants (Inquiries) Act or under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution. But the guarantee being one of an enquiry directed under one of two alternative powers, the exercise of authority under one of the two alternatives is not *prima facie* illegal.

Under either form of enquiry, the public servant concerned has to be given notice of the charges against him ; he has to be supplied with the materials on which the charge is sought to be sustained and if he so desires, he may demand an oral hearing at which the witnesses for the prosecution and his own witnesses shall be examined.

The President of India was not bound before passing an order dismissing a Civil Servant to hear the evidence of witnesses. He could arrive at his conclusion on the evidence already recorded in the inquiry by the Enquiry Commission. By Article 311 of the constitution, a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses *viva voce*, notwithstanding an earlier fair and full enquiry before the Enquiry Commission is recorded.

Appeal from the Judgment and Order, dated the 7th October, 1955 of the Punjab High Court in Civil Writ Petition No. 322 of 1953.

I. M. Lal, K. S. Chawla and *K. R. Krishnaswami*, Advocates for Appellant.

H. N. Sanyal. Additional Solicitor-Geheral of India and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar* and *T. M. Sen*, Advocates, with them) for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Sardar Kapur Singh (who will hereinafter be referred to as the appellant) was admitted by the Secretary of State for India in Council to the Indian Civil Service upon the result of a competitive examination held at Delhi in 1931. After a period of training in the United Kingdom, the appellant returned to India in November, 1933, and was posted as Assistant Commissioner, Ferozepore in the Province of Punjab. He served in the Province in various capacities between the years 1933 and 1947. In July, 1947, he was posted as Deputy Commissioner at Dharamsala and continued to hold that office till February 11, 1948, when he was

* Civil Appeal No. 230 of 1959. 15th December, 1959.

transferred to Hoshiarpur at which place he continued to hold the office of Deputy Commissioner till a few days before April 14, 1949. On April 13, 1949, the appellant was served with an order passed by the Government of East Punjab suspending him from service. On May 5, 1950, the appellant submitted a representation to the President of India protesting against the action of the Government of East Punjab suspending him from service and praying that he be removed from the control of the Punjab Government and that if any disciplinary action was intended to be taken against him, it be taken outside the Province of Punjab by persons appointed by the Government of India and in an atmosphere "free from prejudice and hostility". The Government of East Punjab on May 18, 1950, appointed Mr. Eric Weston, Chief Justice of the East Punjab High Court, as Enquiry Commissioner under the Public Servants (Inquiries) Act (XXXVII of 1850), to hold an enquiry against the appellant on twelve articles of charges. Notice was issued to the appellant of those charges. On November 5, 1950, at the suggestion of the Enquiry Commissioner, the Government of East Punjab withdrew charges Nos. 11 and 12 and the Enquiry Commissioner proceeded to hold the enquiry on the remaining ten charges. Charges 1, 2, 7, 8, 9 and 10 related to misappropriation of diverse sums of money received by or entrusted to the appellant, for which he failed to account. The third charge related to the attempts made by the appellant to secure a firearm belonging to an engineer and the unauthorised retention of that weapon and the procuration of sanction from the Government of East Punjab regarding its purchase. The fourth charge related to the granting of sanction under the Alienation of Land Act for sale of a plot of land by an agriculturist to a non-agriculturist, the appellant being the beneficiary under the transaction of sale, and to the abuse by him of his authority as Deputy Commissioner in getting that land transferred to his name, without awaiting the sanction of the Government. The fifth charge related to the grant to Sardar Raghbir Singh of a Government contract for the supply of 'fire-wood' without inviting tenders or quotations, at rates unreasonably high and to the acceptance of wet and inferior wood which when dried weighed only half the quantity purchased, entailing thereby a loss of Rs. 30,000 to the State. The sixth charge related to purchase of a motor car by abuse of his authority by the appellant and for flouting the orders of the Government, dated March 21, 1949, by entering into a bogus transaction of sale of that car with Messrs. Massand Motors and for deciding an appeal concerning that car in which he was personally interested.

Charges Nos. 1 to 4 and 7 to 10 related to the official conduct of the appellant when he was posted as Deputy Commissioner at Dharamsala and charges Nos. 5 and 6 related to the period when he was posted as Deputy Commissioner at Hoshiarpur.

The Enquiry Commissioner heard the evidence on behalf of the State at Dharamsala between July 31 and August 21, 1950. Enquiry proceedings were then resumed on September 5 at Simla and were continued till October 23 on which date the evidence on behalf of the State was closed. On October 27, the appellant filed a list of defence witnesses. A detailed written statement was filed by the appellant and he gave evidence on oath between November 28 and December 5. The defence witnesses were then examined between December 5 and December 28. It appears that the appellant did not, at that stage desire to examine any more witnesses, and the appellant's case was treated as closed on December 28. On and after December 28, 1950, the appellant filed several applications and affidavits for obtaining certain directions from the Enquiry Commissioner and for eliciting information from the State. On January 2, 1951, the Enquiry Commissioner adjourned the proceeding for the winter vacation. The proceedings were resumed on March 12, 1951, and after recording formal evidence of two witnesses, S. Gurbachan Singh, Sub-Inspector and Ch. Mangal Singh, Sub-Inspector about the statements made by certain witnesses for the defence in the course of the investigation which it was submitted were materially different from those made before the Enquiry Commissioner and after hearing arguments, the enquiry was closed. On May 14, 1951, the Enquiry Commissioner prepared his report. He held that the appellant had taken the amount referred to in charge No. 1 from the Government on the basis of a claim of Raja Harmohinder Singh which was made at the appellant's instance, that the appellant had also received

the amount which was the subject-matter of charge No. 2, that the appellant admitted to have received the amounts which were the subject-matter of charges Nos. 7, 9 and 10, that the amount which was the subject-matter of charge No. 8 was obtained by the appellant from the Government under a fraudulent claim sanctioned by the appellant with full knowledge of its true nature and that accordingly the appellant had received an aggregate amount of Rs. 16,734-11-6 and that even though he had made certain disbursements to refugees, the appellant had failed to account for the disbursement of the amount received by him or anything approximate to that amount and therefore the charge against the appellant for misappropriation must be held proved although the amount not accounted for could not be precisely ascertained. On charges 3 and 4, the Enquiry Commissioner did not record a finding against the appellant. On charge No. 6, he, recorded an adverse finding against the appellant in so far as it related to the conduct of the appellant in deciding an appeal in which he was personally concerned. He held that the conduct of the appellant in giving a contract to Sardar Raghbir Singh which was the subject-matter of charge No. 5 was an act of dishonest preference and the appellant knowingly permitted the contractor to cheat the Government when carrying out the contract and thereby considerable loss was occasioned to the Government for which the appellant was responsible.

This report was submitted to the Government of East Punjab. On February 11, 1952, the Secretary to the Government of India, Ministry of Home Affairs, supplied a copy of the report of the appellant and informed him that on a careful consideration of the report and in particular of the conclusions reached by the Enquiry Commissioner in respect of the charges framed, the President of India was of the opinion that the appellant was "unsuitable to continue" in Government service and that the President accordingly provisionally decided that the appellant should be dismissed from Government service. The appellant was informed that before the President took action, he desired to give the appellant an opportunity of showing cause against the action proposed to be taken and that any representation which the appellant may make in that connection will be considered by the President before taking the proposed action. The appellant was called upon to submit his representation in writing within twenty-one days from the receipt of the letter. The appellant submitted a detailed statement on May 7, 1952, which runs into 321 printed pages of the record.

The President consulted the Union Public Service Commission, and by order dated July 27, 1953, dismissed the appellant from service with immediate effect. The order passed by the President was challenged by a petition filed in the East Punjab High Court for the issue of a writ under Article 226 of the Constitution. The appellant prayed that a writ quashing the proceeding and the report of the Enquiry Commissioner and also a writ of *mandamus* or any other appropriate writ, Direction or Order commanding the Union of India to reinstate the appellant into the Indian Civil Service from the date of suspension be issued. By separate, but concurring judgments, Chief Justice Bhandari and Mr. Justice Khosla of the East Punjab High Court dismissed the petition. Against the order of dismissal of the petition, this appeal has been filed by the appellant pursuant to a certificate of fitness granted by the High Court.

Counsel for the appellant submitted that the order dismissing the appellant was liable to be set aside because the proceedings of the Enquiry Commissioner were without jurisdiction and were in any event vitiated because the Commissioner followed a procedure which was violative of the rules of natural justice. Counsel urged, (1) that the enquiry could not be directed by the Punjab Government as the appellant was a member of the Indian Civil Service and was not employed under the Goverment of East Punjab ; (2) that in any event, the enquiry could not be made under the Public Servants (Inquiries) Act, 1850, and could only be held under rule 55 of the Civil Services (Classification, Control and Appeal) Rules and the enquiry not having been held under that rule the order passed against the appellant was without jurisdiction ; (3) that the enquiry under the Public Servants (Inquiries) Act, 1850, violated the equal protection clause of the Constitution and was accordingly void;

and (4) that the enquiry Commissioner held the enquiry against the appellant in a manner contrary to the rules of natural justice in that the Commissioner did not allow the appellant sufficient opportunity to examine witnesses and to produce documentary evidence in support of his case. The order of dismissal by the President was challenged by the appellant on the plea that the President not having directed *viva voce* examination before him of witnesses whose evidence was recorded by the Enquiry Commissioner and not having given opportunity to the appellant to make an oral submission about the evidence led in the case and particularly the defence, the appellant was deprived of a reasonable opportunity of showing cause against the action proposed to be taken against him.

The appellant was admitted to the civil service under a covenant with the Secretary of State for India, but the special method of recruitment of the appellant to the service does not warrant the view that the appellant was not employed at the material date under the Government of East Punjab. By sub-section 2 of section 10 of the Indian Independence Act, 1947, in so far as it is material, it was enacted that every person appointed by the Secretary of State to a civil service of the Crown in India who continued on and after the appointed day to serve under the Government of the Dominion of India or of any Province or part thereof was entitled to receive the same conditions of service as respects remuneration, leave and pension and the same rights as respects disciplinary matters, or as the case may be as respects the tenure of his office. By sub-section 2 of section 240 of the Government of India Act as amended, a person appointed by the Secretary of State who continued in the establishment of the Dominion of India was not liable to be dismissed by any authority subordinate to the Governor-General or the Governor according as that person was serving in connection with the affairs of the Dominion or the Province. Indisputably, since India became a Republic, by Article 310 (1) of the Constitution, every person who is a member of a civil service of the Union or of an all-India service or holds any civil post under the Union, holds office during the pleasure of the President. But the power to dismiss a member of the civil service of the Union or of an all-India service may not be equated with the authority conferred by statute upon the State under which a public servant is employed to direct an enquiry into the charges of misdemeanour against him. By section 2 of the Public Servants (Inquiries) Act, 1850, it is provided that—

> "Whenever the Government shall be of opinion that there are good grounds for making a formal and public inquiry into the truth of any imputation of misbehaviour by any person in the service of the Government not removable from his appointment without the sanction of the Government, it may cause the substance of the imputations to be drawn into distinct articles of charge, and may order a formal and public inquiry to be made into the truth thereof",

and the expression 'Government' is defined by section 23 of the Act as meaning Central Government in case of persons employed under that Government and the State Government in the case of persons employed under that Government. The appellant was, at the date when enquiry was directed, employed under the East Punjab Government and there is nothing in the Constitution which abrogates the authority of the State to direct an enquiry under section 2 of the Act.

The submission of the appellant that the Act did not apply to enquiries against members of the Indian Civil Service is without force. The Act was, as the preamble recites, passed for regulating enquiries into the behaviour of public servants who are not removable from appointment without the sanction of the Government. The appellant, it is true entered service under a covenant with the Secretary of State for India in Council, but since the commencement of the Constitution of India, the Secretary of State had no authority in the matter of employment and dismissal of public servants employed in the civil service of the Union of India and the members of the Indian Civil Service who continue to remain employed in India hold office during the pleasure of the President, and are accordingly liable to be dismissed from service by the President. The Public Servants (Inquiries) Act, 1850, seeks to regulate enquiries into the behaviour of superior public servants who are not removable from their appointment without the sanction of the Government; enquiries into the behaviour of members of subordinate services, who are appointed and are liable to be

dismissed by authorities subordinate to the Government being excluded from the purview of the Act. There is no foundation for the submission that members of the Indian Civil Service, because they hold office during the pleasure of the President since the commencement of the Constitution, are employees of the President. They are and continue to remain employees of the Union or the State under which they are employed. By the Constitution, the executive power of the Union is conferred upon the President, and it is in exercise of that executive power that the President may dismiss a member of the Civil Service of the Union or of an all-India service from his appointment. Members of the Indian Civil Service are accordingly not liable to be dismissed from their appointment without the sanction of the Government and are not excluded from the purview of the Public Servants (Inquiries) Act, 1850.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules provides:

"Without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court or by a Court Martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule, may in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

It was submitted relying upon that rule, that no order for dismissal or removal of a member of the Indian Civil Service can be passed unless an enquiry is held against him as prescribed by rule 55. But the rule in terms stated that the enquiry contemplated therein is "without prejudice to the provisions of the Public Servants (Inquiries) Act, 1850." The rule apparently means that an order of dismissal, removal or reduction in rank shall not be passed without an enquiry either according to the procedure prescribed by the Public Servants (Inquiries) Act, 1850, or the procedure prescribed by the rule. The Rule does not support the submission that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal or removal or reduction is passed against a member of the civil service, another enquiry expressly directed under rule 55 shall be made. The argument on behalf of the appellant proceeds upon an assumption which is not warranted by the language used, or by the context that the expression 'without prejudice' is used in the rule as meaning 'notwithstanding'.

The observations made in *S. A. Venkataraman* v. *The Union of India and another*[1] by Mr. Justice Mukherjea in delivering the judgment of the Court, that:

"Rule 55, which finds a place in the same chapter, lays down the procedure to be followed before passing an order of dismissal, removal or reduction in rank against any member of the service. No such order shall be passed unless the person concerned has been informed, in writing, of the grounds on which it is proposed to take action against him and has been afforded an adequate opportunity of defending himself. An enquiry has to be made regarding his conduct and this may be done either in accordance with the provisions of the Public Servants (Inquiries) Act, 1850, or in a less formal and less public manner as is provided for in the rule itself",

dispel doubt, if there be any, as to the true meaning of the opening clause of the rule.

Does the holding of an enquiry against a public servant under the Public Servants (Inquiries) Act, 1850, violate the equal protection clause of the Constitution?

1. (1954) S.C.R. 1150 : (1954) S.C.J. 461 : (1954) 1 M.L.J. 702.

The appellant submits that the Government is invested with authority to direct an enquiry in one of two alternative modes and by directing an enquiry under the Public Servants (Inquiries) Act which Act it is submitted contains more stringent provisions when against another public servant similarly circumstanced an enquiry under rule 55 may be directed. Article 14 of the Constitution is infringed. The Constitution by Article 311 (2) guarantees to a public servant charged with misdemeanour that he shall not be dismissed, removed or reduced in rank unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The content of that guarantee was explained in *Khem Chand* v. *The Union of India and others*[1]. It was observed that :—

" the reasonable opportunity envisaged by the provision under consideration includes—

(*a*) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(*b*) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence ; and finally

(*c*) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant."

By the Constitution, to public servants who are not members of the Indian Civil Service charged with misdemeanour a guarantee to a fair enquiry into their conduct is given, *i.e.*, the public servant must be afforded a reasonable opportunity of defending himself against the charges by demonstrating that the evidence on which the charges are sought to be founded is untrue or unreliable, and also by leading evidence of himself and his witnesses to that end; he must, besides, be afforded an opportunity of showing cause against the proposed punishment. The Constitution however does not guarantee an enquiry directed in exercise of any specific statutory power or administrative rules. But the guarantee in favour of members of the Indian Civil Service is slightly different. By Article 314, a public servant who was appointed by the Secretary of State to a civil service of the Crown in India continues except as expressly provided by the Constitution on or after the commencement of the Constitution to serve under the Government of India or of the State subject to the same conditions of service as respects remuneration, leave and pension and the same rights as respects disciplinary matters or ights as similar thereto as changed circumstances may permit as that person was entitled to immediately before the Constitution. Rule 55 of the Civil Services (Classification, Control and Appeal) Rules before the date of the Constitution assured the public servants that no order of dismissal, or removal from service shall be passed except following upon an enquiry, and by Article 314, to civil servants appointed by the Secretary of State the same rights in disciplinary matters as were available before the Constitution are guaranteed. A member of the Indian Civil Service, before disciplinary action is taken against him is therefore entitled by the force of guarantees enshrined in the Constitution to an enquiry into his alleged misdemeanour either under the Public Servants (Inquiries) Act or under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, in operation at the date of the Constitution. But the guarantee being one of an enquiry directed under one of two alternative powers, the exercise of authority under one of the two alternatives is not *prima facie* illegal.

The procedure to be followed in making an enquiry under the Public Servants (Inquiries) Act, 1850, is prescribed in some detail. The Enquiry Commissioner is required to supply to the person accused a copy of the articles of charges and list of the documents and witnesses by which the charges are to be sustained at least three days before the beginning of the enquiry. By section 11, the prosecutor is required to exhibit articles of charges which are read and the person accused is required to plead 'guilty' or 'not guilty' to each of them; then the plea of the person

1. (1958) S.C.J. 497 : (1958) 1 M.L.J. (S.C.) 1080 at 1096-97. 169 : (1958) 1 An.W.R. (S.C.) 169 : (1958) S.C.R.

accused is required to be recorded and if that person refuses, or without reasonable cause neglects to appear to answer the charge either personally or by his counsel or agent, he shall be taken to admit the truth of the articles of charge. By sections 13, 14, 15 and 16, the sequence to be followed in the examination of witnesses is prescribed. Section 18 prescribes the method of maintaining notes of oral evidence. By section 19, after the person accused has made his defence, the prosecutor is given an opportunity to make a general oral reply on the whole case and to exhibit evidence to contradict any evidence exhibited for the defence; but the person accused is not entitled to any adjournment of the proceedings although such new evidence were not included in the list furnished to him. By section 20, power is given to the Enquiry Commissioner to amend the charge. This procedure is evidently prescribed in greater detail than the procedure prescribed by rule 55. Under rule 55, the grounds on which it is proposed to take action against the public servant concerned must be reduced to the form of a definite charge and be communicated to him together with the statement of the allegations on which each charge is based and of any other circumstances on which it is proposed to take into consideration in passing orders on the case. The public servant must be given reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person, and if he desires or if the authority so directs, an oral enquiry must be held. At that enquiry, opportunity is given to the public servant to cross-examine witnesses, to give evidence in person and to examine his own witnesses. The provisions of the Public Servants (Inquiries) Act, 1850, were made more detailed, for the obvious reason that at the time when that Act was enacted, there was no codified law of evidence in force. But the procedure prescribed by Act XXXVII of 1850 and the procedure to be followed under rule 55 are in substance not materially different. Under either form of enquiry, the public servant concerned has to be given notice of the charge against him; he has to be supplied with the materials on which the charge is sought to be sustained and if he so desires, he may demand an oral hearing at which the witnesses for the prosecution and his own witnesses shall be examined.

Counsel for the appellant submitted that the procedure under the Act was more onerous against the public servant concerned in two important respects: (1) under section 11 of Act XXXVII of 1850, if the accused refuses or without reasonable cause neglects to appear to answer the charge, he shall be taken to admit the truth of the articles of charge, whereas there is no similar provision in rule 55; (2) that under section 19 of the Act, even after the evidence for the defence is closed, it is open to the prosecutor to exhibit evidence to contradict evidence exhibited for the defence and the Commissioner is not bound to adjourn the proceeding although the new evidence was not included in the list furnished to the accused whereas there is no similar provision in rule 55. The procedure prescribed by rule 55 is undoubtedly somewhat more elastic, but the provisions similar to those which have been relied upon by counsel for the appellant as discriminatory are also implicit in rule 55. If the public servant concerned does not desire an oral enquiry to be held, there is no obligation upon the authority to hold an enquiry. Again, there is nothing in the rule which prevents the authority from exhibiting evidence for the prosecution after the case of the defence is closed if that evidence is intended to contradict the evidence of the public servant concerned.

The primary constitutional guarantee, a member of the Indian Civil Service is entitled to is one of being afforded a reasonable opportunity of the content set out earlier, in an enquiry in exercise of powers conferred by either the Public Servants (Inquiries) Act or rule 55 of the Civil Services (Classification, Control and Appeal) Rules and discrimination is not practised merely because resort is had to one of two alternative sources of authority, unless it is shown that the procedure adopted operated to the prejudice of the public servant concerned. In the case before us, the enquiry held against the appellant is not in manner different from the manner in which an enquiry may be held consistently with the procedure prescribed by rule 55, and therefore on a plea of inequality before the law, the enquiry held by the

Enquiry Commissioner is not liable to be declared void because it was held in a manner though permissible in law, not in the manner, the appellant says, it might have been held.

The plea that the Enquiry Commissioner held the enquiry in a manner violative of the rules of natural justice, may now be considered. The appellant examined at the enquiry 82 witnesses and he produced a considerable body of documentary evidence. The High Court held that the Enquiry Commissioner dealt with each charge exhaustively and the enquiry was held in a manner just and thorough. According to the learned Judges of the High Court, on all the applications submitted by the appellant, orders were passed by the Enquiry Commissioner and in a majority of the orders detailed reasons for refusing to accede to the request of the appellant were given. They also held that the appellant had no inherent right to require the Commissioner to summon every witness cited and failure to summon the witnesses could not by itself be regarded reasonably as a ground on which the procedure could be challenged as contrary to the rules of natural justice.

In his petition before the High Court, in para. 7 it was suggested by the appellant that his written request to the Enquiry Commissioner to hold the enquiry at Delhi or Simla, but not at Dharamsala where the appellant had a reasonable apprehension that the witnesses will be 'freely suborned and interfered with was summarily rejected'; but admittedly, all the witnesses of the appellant were examined at Simla and not at Dharamsala.

In paras. 8, 9, and 10 of his petition he submitted that even though he had brought to the notice of the Enquiry Commissioner that there was a conspiracy among certain high functionaries of the Government and certain influential politicians against him, the Enquiry Commissioner declined to permit the evidence about the alleged conspiracy to be brought on the record and observed that he will not give any definite finding against any functionary or high officer of the Government and on this account the enquiry was vitiated. Before us, this contention was not pressed. By para. 10 of his petition, the appellant, stated that even those documents which the appellant desired to be called for to rebut the specific charges were not ordered to be called for by the Enquiry Commissioner and he merely directed that if the appellant possessed any copies of such documents, he may file them in the Court and that those documents will be treated as legal substitute for the original documents. The appellant submitted that this extraordinary procedure resulted in the exclusion of the admissions of the high functionaries of the Punjab Government to the effect that the charges framed against the appellant directly arose out of a conspiracy carried out against the appellant. Neither of these grounds was sought to be pressed before us. In para. 11, the appellant stated that the proceedings taken and the charges framed against him were *mala fide* and the result of a conspiracy, that the Enquiry Commissioner excluded other evidence, documentary and oral, which was sought to be produced to show that the specific charges as framed against him were the result of acts of conspiracy, that the Enquiry Commissioner insisted on a discriminatory procedure requiring the appellant to state in advance in case of each item of evidence or witness, as to what the document contained or the witness had to state before he would agree to summon or record the defence evidence while this procedure was not adopted in the case of the prosecution. Before this Court, the plea of *mala fides* or that discrimination was made between the facilities given to the prosecutor and the appellant was not adverted to. But reliance was sought to be placed upon the ground that the appellant was not permitted an opportunity to examine the witnesses whom he desired to examine and to produce certain documentary evidence, and that on some of the applications which had been submitted by the appellant, the Enquiry Commissioner had not passed any orders. Our attention was invited to certain applications which were filed on or after December 28, 1950. As already observed, on December 28, 1950, the last witness for the appellant was examined. His counsel then submitted an application dated December 28, 1950, praying that documents and files which had been admitted by the parties as part of the record of the case be formally exhi-

bited for facility of reference. This indicates that the appellant had nor more evidence to lead after December, 28, 1950. It is not clear on the record whether any express order was passed on this application ; but assuming that there was no such direction given for exhibiting the documents, we fail to appreciate how the procedure followed operated to the prejudice of the appellant. On December 29, 1950, the appellant applied that the Advocate-General appearing for the prosecution be directed to give 'final and complete answers' to certain queries and to produce relevant documents in support of his answers, and as many as seven questions were set out. It appears, from the application, dated December 30, 1950, filed by the appellant that the Enquiry Commissioner asked the appellant to remodel the questions and accordingly a fresh application with questions re-modelled was submitted. On that application, the Commissioner ordered that he had no objection to allow the appellant to give evidence as to some incident about 'Fauji Mela' even though there was no reference to that matter at any earlier stage. He, however, declined to allow any further evidence to be called and observed that he had not given to the Prosecutor any special privilege, and that it was not the case of the Prosecutor that there existed express instructions to District Officers in the management of trust funds. The appellant also submitted another application, dated December 30, 1950, praying that the Prosecutor may be asked to reply to the questions set out therein and to produce documents in support of his answers. The Enquiry Commissioner ordered that answers to the questions may be given on affidavits obviating thereby the necessity of considering the prayer for further evidence, and he called upon the Prosecutor to file answers within one month. In the meanwhile, on December 29, 1950, the appellant had submitted an affidavit in which he had set out what happened at a meeting between the Governor of East Punjab, the Chief Secretary and the Deputy Commissioners of various districts and the Superintendents of Police, and made certain submissions with regard to the record which had been produced. On Decemb r 31, 1950, referring to the order passed by the Commissioner giving the appellant an opportunity to give evidence regarding the 'Fauji Mela' the latter requested the Commissioner to direct the Prosecutor to file an affidavit on certain facts stated in the application with a view to enable him to take further necessary steps to establish his contentions in the ma.ter. On that application, the Enquiry Commissioner ordered that the Prosecutor was unable to make statements and in the circumstances of the case he could not accept that further enquiries be allowed. On January 2, 1951, the appellant produced a post card alleged to have been received by him and which he contended had a bearing on his evidence in the enquiry and prayed that if the Enquiry Commissioner had no objection, 'the writer of the enclosure be heard as defence witness before the defence was closed.' But it does not appear that any attempt was made to summon the writer, Suraj Parkash Bakhshi or to keep him present before the Enquiry Commissioner. When the Enquiry Commissioner resumed his enquiry after th winter vacation, on March 12, 1951, the appellant's counsel ubmitted a narrative regarding the alleged victimisation of certain witnesses. The Enquiry Commissioner ordered thereon that he could not enter upon an enquiry as to the alleged victimisation of the witnesses. On March 12, 1951, the appellant submitted another application requesting that immediate steps be taken to examine one Tikka Nardev Chand of Guler in the "light of certain extra-judicial statements" mad by him and also the clerk of the Court of Wards of the Deputy Commissioner's Office may be summoned with necessary papers and files to show as to when the property of the Raja of Guler was taken possession by the Deputy Commissioner and when the allowances of th Raja of Guler and his other dependants were fixed. The Enquiry Commissioner observed that the application was belated and that although he was away from Simla, he was accessible by post and his whereabouts were ascertainable and that he could not allow further evidence of that nature to go on the record. At the instance of the Prosecutor, th Enquiry Commissioner allowed two witnesses, S. Gurbachan Singh and Ch. Mangal Singh to formally prove the statements made by two witnesses, Bishan Das Gupta and Shahbaz Singh who it was claimed had made in the course of the enquiry statements on oath inconsistent with the statements made in the course of the

investigation. Pursuant to the order of the Enquiry Commissioner dated December 30, 1950, the Prosecutor filed certain answers on March 13, 1951, to the questions which were ordered by the Enquiry Commissioner to answer.

The appellant's counsel has conceded that the entire record of the Enquiry Commissioner is not before us. Both the learned Judges of the High Court have held that on every application submitted by the appellant, the Enquiry Commissioner had passed his orders and in a large majority of the orders, detailed reasons were given. We are in this case not concerned to adjudicate upon the correctness of the orders passed by the Enquiry Commissioner on those applications. We are only concerned to decide whether the proceedings were conducted in a manner violative of the rules of natural justice. In the petition before the High Court, beyond a vague ref rence in para. 11 that evidence wsas excluded and documentary and oral evidence to show that the specific charges framed against him were the result of a conspiracy "was not allowed to go in ", no particulars were furnished. In the circumstances, we are unable to hold that the proceedings were conducted in a manner violative of the rules of natural justice. The appellant has not set out in detail in his petition before the High Court specific instances in which evidence was sought to be given, explaining how the evidence was relevant and how the appellant was prejudiced by the evidence being shut out. In the absence of any express pleading and adequate material to support the plea, we are unable to disagree with the view of the High Court that the enquiry was not vitiated on account of violation of the rules of natural justice.

The President of India was not bound before passing an order dismissing the appellant, to hear the evidence of witnesses. He could arrive at his conclusion on the evidence already recorded, in the enquiry by the Enquiry Commissioner. By Article 311 of the Constitution, a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses *viva voce*, notwithstanding an earlier fair and full enquiry before the Enquiry Commissioner, is recorded. In *The High Commissioner for India and another* v. *I.M. Lal*[1], dealing with section 240, clause 3, Lord Thankerton in dealing with similar contentions observed :

" In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges and the acutal punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an inquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out ; but that would not exhaust his statutory right, and he would still be entitled to reprssent against the punishment proposed as the result of the findings of the inquiry."

And this view was affirmed by this Court in *Khem Chand* v. *The Union of India and others*[2], where at page 1099, it was observed by Chief Justice S. R. Das :

"Of course if the Government servant has been through the enquiry under rule 55 it would not be reasonable that he should ask for a repetition of that stage, if duly carried out."

By the Constitution, an opportunity of showing cause against the action proposed to be taken against the public servant is guaranteed and that oppotunity must be a reasonable opportunity. Whether opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. The enquiry in this case was held by the Enquiry Commissioner who occupied the High office of Chief Justice of the East Punjab High Court. The appellant himself examined 82 witnesses and produced a large body of documentary evidence and submitted an argumentative defence which covers 321 printed pages. An opportunity of making an oral representation not being in our view a necessary postulate of an

1. (1948) F.C.R. 44 : (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).
2. (1958) S.C.J. 497 : (1958) 1 M.L.J. (S.C.) 169 : (1958) 1 An. W.R. (S.C.) 169 : 1958 S.C.R. 1080 at 1096-97.

opportunity of showing cause within the meaning of Article 311 of the Constitution, the plea that the appellant was deprived of the constitutional protection of that Article because he was not given an oral hearing by the President cannot be sustained.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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[END OF VOLUME (1960) I M.L.J. (SUPREME COURT.)].